Supreme Court, U.S.
FILED

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

EMILY ADLER, et al.,

Petitioners,

vs.

DUVAL COUNTY SCHOOL BOARD, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI (VOLUME I)

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August 8, 2001

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[PUBLISH]

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
MAY 11, 2001
THOMAS K. KAHN

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 98-2709

D.C. Docket No. 98-00460-CIV-J-10C

EMILY ADLER, individually; on behalf
of herself and all persons similarly situated,
SETH FINCK, individually; on behalf of
himself and all persons similarly situated, et al.,

Plaintiffs-Appellants,

versus

DUVAL COUNTY SCHOOL BOARD,
DUVAL COUNTY PUBLIC SCHOOL DISTRICT,

Defendants-Appellees.

No. 98-2720

D.C. Docket No. 98-00460-CIV-J-IOC

EMILY ADLER, individually; on behalf of herself and all persons similarly situated, SETH FINCK, individually; on behalf of himself and all persons similarly situated, et al.,

Plaintiffs-Appellees,

versus

SUSAN BOLES, as parent & next friend of Rebecca Boles, a minor child and on behalf of all public school students within the Duval County Public School District,

Movants-Appellants.

Appeals from the United States District Court for the Middle District of Florida

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(May 11, 2001)

Before ANDERSON, Chief Judge, TJOFLAT, EDMONDSON, BIRCH, DUBINA, CARNES, BARKETT, HULL, MARCUS, WILSON, KRAVITCH and COX*, Circuit Judges.**

MARCUS, Circuit Judge:

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*Circuit Judges Kravitch and Cox elected to participate in this decision, pursuant to 28 U.S.C. § 46(c).

**Circuit Judge Susan H. Black did not participate in this decision.

On March 15, 2000, this Court ruled that Duval County's facially-neutral policy permitting high school seniors to vote upon the delivery by a student of a message entirely of that student's choosing as part of graduation ceremonies did not violate the Establishment Clause. Adler v. Duval County Sch, Bd., 206 F.3d 1070 (11th Cir.) (en banc), pet. for cert. granted and judgment vacated, 121 S. Ct. 31 (2000). Plaintiffs thereafter petitioned the Supreme Court for certiorari. Meanwhile, on June 19, 2000, the Supreme Court rendered its decision in Santa Fe Independent School District v. Doe, 530 U.S. 290, 120 S.Ct. 2266 (2000),which invalidated a Texas school board's policy permitting students to vote upon the delivery of a "statement or invocation," subject to officials' approval, at each home high school football game. On October 2, 2000, the Court vacated our decision* and remanded it for further consideration in light of Santa Fe. The case was returned to us on December 19, 2000, and we proceeded to rehear the case en banc.

Having carefully reviewed the Supreme Court's opinion, and considered supplemental briefs from the parties and amici, we conclude that Santa Fe does not alter our previous en banc decision, and accordingly we reinstate that decision and the judgment in favor of Duval County. Nevertheless, we take this opportunity to explain why we believe that Santa Fe does not alter the outcome of this case. Simply put, after (as before) Santa Fe, it is impossible to say that the Duval County policy on its face violates the Establishment Clause without effectively banning all religious speech at school graduations, no matter how

private the message or how divorced the content of the message may be from any state review, let alone censorship. Santa Fe does not go that far, and we are not prepared to take such a step.

I.

At the outset, it is helpful to summarize briefly the facts and analysis of our prior en banc opinion. The Duval County policy provides in relevant part:

> "1. The use of a brief opening and/or closing message, not to exceed two minutes, at high school graduation exercises shall rest within the discretion of the graduating senior class;
>
> 2. The opening and/or closing message shall be given by a student volunteer, in the graduating senior class, chosen by the graduating senior class as a whole;
>
> 3. If the graduating senior class chooses to use an opening and/or closing message, the content of that message shall be prepared by the student volunteer and shall not be monitored or otherwise reviewed by Duval County School Board, its officers or employees;

> The purpose of these guidelines is to allow students to direct their own graduation message without monitoring or review by school officials."

206 F.3d at 1072 (emphasis added). We defined the issue then before us as "whether the Duval County school system's policy of permitting a graduating student, elected by her class, to deliver an unrestricted message of her choice at the beginning and/or closing of graduation ceremonies is facially violative of the Establishment Clause." Id. at 1073. Analyzing this policy under the Supreme Court's opinions in Lee v. Weisman, 505 U.S. 577 (1992) and Lemon v. Kurtzman, 403 U.S. 602 (1971), we concluded that the policy did not violate the Establishment Clause on its face.[1]

Although we offered multiple reasons for that decision, our Lee analysis turned on several key facts. First, we emphasized that under Duval County's policy school officials have no power to direct that a message (let alone a religious message) be delivered at graduation ceremonies, or control in any way the content of any message actually to be delivered. As we explained:

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[1]We expressly declined to consider at that time any as-applied objection to the policy's constitutionality. 206 F.3d at 1073 n.4 ("We do not address any potential 'as-applied' claims raised below by Appellants."). Accordingly, we did not consider Appellants' objections regarding the policy's alleged application after 1993. Nothing in Santa Fe in any way affects that decision or supports consideration of Appellants' as-applied challenges now.

[U]nder the Duval County graduation policy ... neither the School Board nor its principals may ordain, direct, establish, or endorse a religious prayer or message of any kind. Indeed, by the very terms of the policy, a religious message may not even be offered at graduation. The Duval County policy explicitly divorces school officials from the decision-making process as to whether any message -- be it religious or not -- may be delivered at graduation at all. Moreover, decisional control over the most crucial elements o@ - tie graduation policy rests with the students and not the state.... Under the policy, the School Board and its agents have no control over who will draft the message (if there be any message at all) or what its content may be. The School Board also does not suggest in any way, let alone require, that the graduating class consider religious or any other criteria in deciding whether to have a student message or in selecting a particular student speaker. And most notably, if the graduating class chooses to have a message, the content of the message shall be prepared by the student speaker alone and no one else. The Duval County School Board is expressly prohibited by the very terms of its policy from influencing or editing the message in any way. [The] decision [as to content] rests solely with the elected student speaker – with neither the senior class nor the school exercising any sort of editorial oversight. Therefore, on the face of the policy itself, the students unambiguously understand that any student message is utterly divorced from any state sponsorship.

206 F.3d at 1076.

Second, we rejected the argument that the state's role in providing a vehicle for a graduation message by itself transformed the student's private speech into state-sponsored speech. We accepted the assumption that the school board "exerted overwhelming control over the graduation ceremony," but stressed that the board "did not have control over the elements which are most crucial in the Establishment Clause calculus: the selection of the messenger, the content of the message, or most basically, the decision whether or not there would be a message in the first place." Id. at 1080.

We likewise rejected the argument that Duval County's policy would have the impermissible effect of coercing unwilling listeners to participate in a state sponsored religious exercise. As we explained:

> [N]either the Duval County schools nor the graduating senior classes even decide if a religious prayer or message will be delivered, let alone "require" or "coerce" the student audience to participate in any privately-crafted message. While schools may make private religious speech their own by endorsing it, schools do not endorse all speech that they do not censor. We cannot assume ... that Duval County seniors will interpret the school's failure to censor a private student message for religious content as an endorsement of that message -- particularly where the students are expressly informed as part of the election process

> that they may select a speaker who alone will craft any message.... No religious result is preordained.

Id. at 1084.

Citing these and other facts, we found as well that the policy met all three prongs of the Lemon test. We concluded that the policy had a secular purpose, including "affording graduating students an opportunity to direct their own graduation ceremony," and "permitting student freedom of expression." Id. at 1085. We also noted that the text of the policy did not reveal a religious purpose, and that the limited pieces of background evidence highlighted for the contention that the policy's secular purpose was a sham could not "strip the policy of [its] secular purpose. No matter what an individual board member may have hoped -- and they said nothing on the record about codifying this policy -- Duval County's policy is facially neutral and undeniably evinces a secular purpose." Id. at 1089. We closed our prior en banc opinion by defining our holding narrowly, stating that Duval County's policy of "permitting graduating students to decide through a vote whether to have an unrestricted student graduation message at the beginning and/or closing of graduation ceremonies does not facially violate the Establishment Clause." Id. at 1091 (emphasis added).

II.

Three months after we issued our prior en banc opinion, the Supreme Court decided Santa Fe. By a 6-3

vote, the Court found that a school district policy permitting students to vote upon the delivery by a student of a "statement or invocation" prior to high school football games violated the Establishment Clause. Because the facts of Santa Fe are fundamentally different in many crucial respects from the facts of this case, they are worth presenting in some detail.

For a period of time leading up to and including the 1992-93 and 1993-94 school years, the Santa Fe school district allowed students to read overtly Christian prayers from the stage at graduation ceremonies and over the public address system at home football games. The prayers were characterized as "invocations" or "benedictions" for these events, and typically were given by officers of the student council. Similar prayers were recited by the student council "chaplain" prior to the start of football games.

In 1994, responding to the Supreme Court's decision in Lee. the district drafted a written policy that prohibited clerics from delivering invocations or benedictions at graduation ceremonies, but otherwise did not prohibit prayer at school functions. After graduation ceremonies that year, the district amended its written policy to say that a school "may permit the graduating senior class(es), with the advice and counsel of the senior class sponsor, to elect to choose student volunteers to deliver nonsectarian, non-proselytizing invocations and benedictions for the purpose of solemnizing their graduation ceremonies." The same policy was adopted for football games.

In April 1995, several students and parents filed suit in federal court, in part to prevent the district from violating the Establishment Clause at imminent graduation exercises. In their complaint the plaintiffs alleged that the district engaged in other proselytizing practices, such as promoting attendance at a Baptist revival meeting, encouraging membership in religious clubs, chastising children who held minority religious beliefs, and distributing Gideon Bibles on school premises. Santa Fe, 120 S. Ct. at 2271-72.

In response to a court order, Santa Fe again revised its policies dealing with prayer at school functions. Policies enacted in May and July 1995 for graduation ceremonies provided the format for the District's August 1995 policy regarding high school football games. That August policy authorized two student elections, the first to determine whether an "invocation" should be delivered, and the second to select the spokesperson to deliver it. On August 31, 1995, according to the parties' stipulation, "the district's high school students voted to determine whether a student would deliver prayer at varsity football games .... The students chose to allow a student to say a prayer at football games." A week later, in a separate election, they selected a student ... to deliver the prayer at varsity football games.'" Id. at 2273 (emphasis added).

Subsequently, in October 1995, the school district slightly modified the August policy. The October version of the policy was (in the Supreme Court's words) "essentially the same as the August policy, though it omits the word

'prayer' from its title, and refers to 'messages' and 'statements' as well as 'invocations.'" Id. The October policy provided in relevant part:

> The board has chosen to permit students to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.
>
> Upon advice and direction of the high school principal, each spring, the high school student council shall conduct an election, by the high school student body, by secret ballot, to determine whether such a statement or invocation will be a part of the pre-game ceremonies and if so, shall elect a student from a list of student volunteers, to deliver the statement or invocation. The student volunteer who is selected by his or her classmates may decide what message and/or invocation to deliver, consistent with the goals and purposes of this policy.

120 S. Ct. at 2273 n.6.

After the Fifth Circuit held that both the August and October policies violated the Establishment Clause, the Supreme Court granted the District's petition for certiorari,

limited to the following question: "Whether petitioner's policy permitting student-led, student-initiated prayer at football games violates the Establishment Clause." Id. at 2275 (emphasis added). The Court did not propose to address, and did not address in its ensuing opinion, the district's graduation policies.

A majority of the Court found that the October policy violated the Establishment Clause. The Court analyzed the policy under the principle of Lee that "government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion. . . . '" 120 S. Ct. at 2275 (quoting Lee, 505 U.S. at 587). Initially, the Court determined that messages delivered by students pursuant to the policy would constitute state-sponsored speech rather than private speech. The Court offered essentially four reasons for that finding: (1) the student's speech would be authorized by a government policy that explicitly and implicitly encouraged one particular kind of message, see 120 S. Ct. at 2275, 2279; (2) it would take place on school property at a school event, see id. at 2275, 2278; (3) the government had broad power to regulate the content of the student's speech, see id. at 2276-77; and (4) the electoral system would yield only a single speaker and would completely prevent dissenting viewpoints from being heard, see id. at 2276-77.

Having found that student speech under the policy was, and would be perceived as, state-sponsored, the Court then found that the religious content of the "statement or

invocation" permitted by the Santa Fe policy was impermissibly coercive. The Court explained that "[t]he electoral mechanism, when considered in light of the history in which the policy in question evolved, reflects a device the District put in place that determines whether religious messages will be delivered at home football games." Id. at 2280. The Court also reasoned that, even though the case was brought as a facial challenge, it was appropriate as part of the facial inquiry to consider the purpose of the policy. Id. at 2282 (citing Lemon). The Court stressed that "the text of the October policy alone reveals that it has an unconstitutional purpose," and added that the events leading up to the enactment of the October policy further conveyed the school board's purpose to ensure a place for prayer in school functions. Id. For these reasons, the Court concluded that the Santa Fe's football game policy was unconstitutional.

III.

In Santa Fe itself the Supreme Court reiterated just how case-specific Establishment Clause analysis must be under its precedent. As the Court explained:

> Whether a government activity violates the Establishment Clause is "in large part a legal question to be answered on the basis of judicial interpretation of social facts .... Every government practice must be judged in its unique circumstances . . . ."

120 S. Ct. at 2282 (citation omitted). We spoke similarly in our prior en banc opinion:

> Establishment Clause jurisprudence calls for the difficult task of separating a student's private message, which may be religious in character, from a state-sponsored religious message, protecting the former and prohibiting the latter. This determination is of "necessity one of line-drawing," see Lee, 505 U.S. at 598, "sometimes quite fine, based on the particular facts of each case," Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 847 (1995) (O'Connor, J., concurring). Indeed, our courts have recognized that "at graduation time and throughout the course of the education process, there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students." See Lee, 505 U.S. at 598-99.

206 F.3d at 1074 (citations omitted).

The Court in Santa Fe did not attempt to sweep with a broad brush; rather, it found based on the facts then before it that Santa Fe's policy allowing students to elect a speaker to give a "statement or invocation" of plainly religious bent, at every single home football game, subject to content review by school officials and potential state censorship of non- or anti-religious messages, violated the Establishment Clause. The facts of this case are fundamentally different,

and in our view require exactly the same result today as they did at the time of our prior opinion.

A.

Critical to the Supreme Court's conclusion was its finding that the speech delivered by students pursuant to the Santa Fe policy was state-sponsored rather than private. In reaching that conclusion, the Court relied in substantial part on two facts: (1) the speech was "subject to particular regulations that confine the content and topic of the student's message," Santa Fe, 120 S. Ct. at 2276; and (2) the policy, "by its terms, invites and encourages religious messages," id. at 2277 (emphasis added). Those two dispositive facts are not present here, and that makes all the difference.

First, the Duval County policy does not contain any restriction on the identity of the student speaker or the content of the message that might be delivered. Indeed, school officials are affirmatively forbidden from reviewing the content of the message, and are expressly denied the opportunity to censor any non-religious or otherwise disfavored views:

> "If the graduating senior class chooses to use an opening and/or closing message, the content of that message shall be prepared by the student volunteer and shall not be monitored or otherwise reviewed by Duval County School Board, its officers or employees. [] The purpose of these

guidelines is to allow students to direct their own graduation message without monitoring or review by school officials."

206 F.3d at 1072 (quoting policy) (emphasis added). This is in sharp contrast to the Sante Fe policy, under which any message was subject to content regulation by the state. The Santa Fe policy dictated that the process of selecting a speaker and delivering the message was subject to the ... advice and direction of the high school principal.'" 120 S. Ct. at 2273 n.6. As part of that process, school officials were effectively authorized to review the message itself to ensure that it was ... "'consistent with the goals and purpose of th[e] policy.'" Id. The policy therefore created virtually no check on school officials' power to regulate the proposed student message, giving almost unfettered discretion to state officials acting under the guise of determining that the message would be "'appropriate.'" Id.

The ability to regulate the content of speech is a hallmark of state involvement, and the Supreme Court returned repeatedly to that theme in Santa Fe. The Court highlighted that "[t]he statement or invocation ... is subject to particular regulations that confine the content and topic of the student's message." Id. at 2276. The Court observed that "Santa Fe's student election system ensures that only those messages deemed 'appropriate' under the District's policy may be delivered." Id.; see also id. at 2279. And the Court expressly characterized the Santa Fe policy as "not a content-neutral regulation" because of its "content

restrictions." Id. at 2282; see also id. at 2277 (emphasizing that "the policy mandates that the 'statement or invocation' be 'consistent with the goals and purposes of this policy'" and that accordingly "the District has failed to divorce itself from the religious content of the invocations"). The ability of the state to regulate the content of the students' message was a critical factor in the Court's reasoning, and is indisputably not present in this case. Under the Duval County policy, if the senior class elects to have a message, the student elected to give that message is totally free and autonomous to say whatever he or she desires, without review or censorship by agents of the state or, for that matter, the student body. No reasonable person attending a graduation could view that wholly unregulated message as one imposed by the state.

Second, unlike Santa Fe's policy, the Duval County policy does not "by its terms, invite[] and encourage[] religious messages." 120 S. Ct. at 2277. On the contrary, the policy is entirely neutral regarding whether a message is to be given, and if a message is to be given, the content of that message. Although the Supreme Court did not limit its analysis to the text of the Santa Fe policy, it placed heavy emphasis on the text's express and unambiguous preference for the delivery of religious messages.

> The policy itself states that the purpose of the message is "to solemnize the event." A religious message is the most obvious method of solemnizing an event. Moreover, the requirements

> that the message "promote good citizenship" and "establish the appropriate environment for competition" further narrow the types of message deemed appropriate, suggesting that a solemn, yet nonreligious, message, such as commentary on United States foreign policy, would be prohibited. Indeed, the only type of message that is expressly endorsed in the text is an "invocation" -- a term that primarily describes an appeal for divine assistance. In fact, as used in the past at Santa Fe High School, an "invocation" has always entailed a focused religious message. Thus, the expressed purposes of the policy encourage the selection of a religious message.

Id. The fact that the text of the Santa Fe policy expressed a clear preference for religious messages was a key factor in the Court's determination that student speech delivered pursuant to that policy would be viewed as state-sponsored. Id. at 2278-79; compare also id. at 281 ("[N]othing in the Constitution ... prohibits any public school student from praying .... But the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer.") (emphasis added). In this case, the text setting forth the Duval County policy contains no language approving an "invocation" and no other provision that could fairly be read to require or approve a "religious" theme.

These important facts demonstrate why Santa Fe is distinguishable from this case, and more particularly why the speech at issue here -- unlike the speech contemplated by the Santa Fe policy -- cannot reasonably be described as state-sponsored. These key facts also help illustrate why the speech permitted by Duval County cannot reasonably be described as state "coercion" of religion.

The linchpin of the Court's analysis on this issue was its finding that Santa Fe's policy "subject[ed] the issue of prayer to a majoritarian vote." 120 S. Ct. at 2281; see also id. at 2283 ("Simply by establishing this school-related procedure, which entrusts the inherently nongovernmental subject of religion to a majoritarian vote, a constitutional violation has occurred."). In essence, the Court found that the policy, by specifically permitting students to vote upon an "invocation" and authorizing school officials to ensure that any message proposed by the chosen student was "appropriate," made it virtually impossible for the election to be anything other than a referendum on conducting prayer. Indispensible to this analysis was the school district's unambiguous concession that the vote authorized by. the policy was indeed a vote up-or-down on prayer:

> The Chief Justice contends that we have "misconstrue[d] the nature ... [of] the policy as being an election on 'prayer' and 'religion.' We therefore reiterate that the District has stipulated to the facts that the most recent election was held "to determine whether a student would deliver prayer

> at varsity football games," that the "students chose to allow a student to say a prayer at football games," and that a second election was then held "to determine which student would deliver the prayer."

120 S. Ct. at 2283 n.24 (citations omitted). There has been no such critical concession in this case, and it cannot plausibly be argued that, on its face, the Duval County policy calls for a student vote on whether to mandate the inclusion of prayer in a graduation ceremony.

The Duval County policy, unlike the Santa Fe policy, does not subject the issue of prayer to an up-or-down vote; students do not vote on whether prayer, or its equivalent, should be included in graduation ceremonies. Rather, students vote on two questions that do not expressly or inherently concern prayer: (1) whether to permit a student "message" during the ceremony, and (2) if so, which student is to deliver the message. Santa Fe does not remotely state or suggest that the term "message" connotes prayer, nor could it plausibly give so narrow a meaning to so broad a term. Instead, the Court repeatedly focused on the Santa Fe policy's use of the additional term "invocation," and drew from that term and the school district's concessions the conclusion that Santa Fe's policy mandated a vote on prayer. See id. at 2277. Similarly, there is no suggestion in Santa Fe that the terms "opening" and "closing" as used in Duval County's policy connote prayer. Indeed, those terms did not even appear in Santa Fe's policy. Simply put,

"[w]hatever majoritarian pressures are attendant to a student-led prayer pursuant to a direct student plebiscite on prayer are not facially presented by the Duval County policy." 206 F.3d at 11083 (emphasis added).

Although it is possible that under Duval County's policy the student body may select a speaker who then chooses on his or her own to deliver a religious message, that result is not preordained, and more to the point would not reflect a "majority" vote to impose religion on unwilling listeners. Rather, it would reflect the uncensored and wholly unreviewable decision of a single student speaker. It cannot seriously be argued that Duval County's policy ensures that persons with minority" views will never prevail in the student electoral process, whether we define "minority" in this context as persons opposed to the delivery of student-selected speech at graduation, persons opposed to the delivery of religious messages generally, or persons opposed to the delivery of a religious message that does not coincide with their chosen faith. In fact, the limited record before us proves just the opposite; in seven of the 17 instances reflected in the record, students voted for no message at all or for a student speaker who subsequently delivered an entirely secular message. 206 F.3d at 1083-84. Yet in Santa Fe, the Court rested its holding in large part on the assumption that "the majoritarian process implemented by the district guarantees, by definition, that minority

candidates will never prevail and that their views will be effectively silenced." 120 S. Ct. at 2276 (emphasis added).[2]

For all of these reasons, the private speech delivered by a student pursuant to the Duval County policy does not become state-sponsored as a matter of law simply by virtue of the logic of Santa Fe.

Santa Fe also does not alter the analysis under the three-part test of Lemon. Santa Fe only addresses one part of the Lemon test: whether the policy at issue has a secular purpose. 120 S. Ct. at 2282-83. The Court's treatment of this

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[2]In his dissent, Judge Carnes asserts that "[t]he majority of the senior class selects and endorses the message because the majority selects the messenger." Infra at 44. But we think Judge Carnes's core assumption -- that the student speaker is nothing more than a puppet to give voice to the student body majority's demands for prayer -- is deeply flawed. To begin with, it ignores the express language of the policy, which does not allow (indeed, forbids) any regulation of the content of the speech. Under Duval County's policy, the student is free to give whatever message he chooses, regardless of whether that message comports with the views on religion, school prayer, or any other subject held by the majority that elected him. Ignoring the language of the policy is particularly dangerous where, as here, we are considering only a facial challenge, in which the primary focus by definition must be the text. Judge Carnes's reasoning also takes no account of students' ability -- and willingness -- to exercise the free and untrammeled speech authorized by the policy. Graduating seniors are squarely on notice, from the very language of the policy, that any speaker they may choose will have complete autonomy over the message he eventually delivers at graduation. Students recognize this fact when voting in favor of a message, and the speaker himself recognizes that fact in choosing what kind of message to deliver. The notion that "the content of the message is censored in advance through the majority selection process," infra at 47, is as pessimistic about the exercise of First Amendment freedoms as it is hostile to the text of the policy.

issue, however, underscores the differences between the Santa Fe policy and this policy. As discussed above, the text setting forth the Duval County policy does not evince a religious purpose. The text of the Santa Fe policy unambiguously did precisely that, a fact upon which the Court placed great emphasis. Id. at 2282 ("the text of the ... policy alone reveals that it had an unconstitutional purpose").

The Supreme Court's additional discussion of circumstances surrounding enactment of the Santa Fe policy is not inconsistent with our prior en banc opinion. We did not decline to explore the background to the Duval County policy. On the contrary, we did so at considerable length, concluding that "whether standing alone or in concert, the evidence marshaled by the Appellants to allege that the policy's secular purpose was a sham "cannot strip the policy of a secular purpose." 206 F.3d at 1089; see generally id. at 1086-89. More to the point, we found specifically that the limited record before us did not permit us "to fairly infer the motivation of those who promulgated or distributed the policy." Id. at 1086. Obviously, nothing in Santa Fe resolves that inescapable threshold problem.[3]

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[3]Much of Judge Kravitch's dissent is devoted not to considering Santa Fe, but rather to disputing this Court's conclusion in its prior en banc opinion that the Duval County policy has a secular purpose. As we have emphasized, nothing in Santa Fe in any way affects our earlier findings on that issue, which were based on the unique record of this case. Of the dissent's remaining objections, only two points need be noted separately. First, contrary to the dissent's suggestion, our prior opinion did not turn on an assumption that the school district created a public forum at graduation.

Moreover, the circumstances at issue in Santa Fe were vastly different in several important respects. Among other distinctions, the final version of the Santa Fe policy was found to be nothing more than the product of repeated efforts by the school district to inject prayer and other religious activities into school events even after Lee. v. Weisman. See 120 S. Ct. at 2272-73; see also id. at 2279 (describing Santa Fe's policy as nothing more than a direct "evolution ... from the long-sanctioned office of 'Student Chaplain"'). In addition, in Santa Fe, school officials stated unabashedly that the policy was designed to permit a student vote for prayer at graduation. Quite simply, Santa Fe does not undermine our finding that Duval County's policy, on this record in this facial challenge, has a secular purpose.

B.

For the reasons we have discussed, the facts of Santa Fe are not so similar to the facts of this case as to require us to alter our prior decision. On the contrary, the differences

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We simply observed in passing that "[i]n one sense" such an analogy could be drawn. 206 F.3d at 1077. Second, contrary to the dissent's suggestion, we plainly did not reject the Appellants' facial challenge because it was premature. Instead, we expressly rejected that challenge on the merits. See id. at 1090-91. Finally, we observe that the dissent does not answer our discussion of the two critical distinctions between this case and Santa Fe (the absence here of content regulation and a policy that by its ten-ns invites religious messages). Although we certainly agree that those facts were not the only ones considered by the Court in Santa Fe, they were absolutely essential to the Court's decision, and simply are not present in this case.

between this case and Santa Fe are substantial and material. The only basis for us to alter our prior decision, therefore, would be if the Supreme Court had promulgated new rules of law that we failed to apply in our prior decision. The Court did no such thing, however. The analysis in Santa Fe proceeded under the very same framework of Lee and Lemon that we applied in our prior decision.

The Supreme Court did not rule that an election process itself is always incompatible with the Establishment Clause. Nor did it rule that a student elected to speak to the student body is necessarily a state-sponsored speaker. Rather, the Court stressed that it was not invalidating all student elections, but merely concluding on the facts before it "that the resulting religious message under this policy would be attributable to the school, not just the student." Id. at 2283 n.23.[4]

Second, the Court did not rule that, simply because the speech at issue is "authorized by a government policy and

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[4]The Court did remark that "student elections that determine, by majority vote, which expressive activities shall receive or not receive school benefits are constitutionally problematic." 120 S. Ct. at 2276 (citing Board of Regents of Univ. of Wis. Svs.. v. Southworth, 120 S. Ct. 1346 (2000)). As noted above, however, the Duval County policy does not mandate a student election to determine by majority vote whether school facilities should be used to disseminate a religious message at graduation. The "expressive activities" as to which students vote -- whether to permit a student to deliver a message (totally unreviewable and uncensored by the state) at graduation, and who if anyone may deliver the message of his or her choosing -- are neutral.

took place on government property at a government-sponsored, school-related event" it always constitutes state-sponsored speech. On the contrary, the Court expressly acknowledged that "not every message delivered under such circumstances is the government's own." Santa Fe, 120 S. Ct. at 2275. What turns private speech into state speech in this context is, above all, the additional element of state control over the content of the message. Id. at 2275-76. But it is the element of potential censorship, and the attendant risk recognized by Santa Fe that non-religious messages (or messages hostile to religion) will be suppressed, that is conspicuously absent from the record of this case. Notably, in our prior en banc opinion, we explained how affording students the opportunity to vote on whether or not to have a message that would be entirely of the student's choosing bore no more the imprimatur of the state than the process of selecting a homecoming queen. 206 F.3d at 1082. Presented with a similar "prom queen" argument by the dissenters in Santa Fe, the Court gave as its only distinction "[t]he fact that the District's policy provides for the election of the speaker only after the majority has voted on her message...." 120 S. Ct. at 2276 n. 15. That distinction plainly does not exist in this case.

Third, our prior en banc opinion fully considered the purpose of the Duval County policy. Accordingly, the opinion is consistent with the Supreme Court's observation that "[o]ur Establishment Clause cases involving facial challenges ... have not focused solely on the possible applications of the statute, but rather have considered

whether the statute has an unconstitutional purpose." Id. at 2281.[5]

Finally, our conclusion that the purpose of Duval County's policy is secular did not turn entirely or even largely on our finding that one of the purposes of the policy is to "allow students to solemnize graduation." 206 F.3d at 1085. As noted above, we identified three genuine secular purposes driving the policy; permitting solemnization of this seminal education experience is only one of those purposes. In any event, the Court's own words demonstrate

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[5]In our prior en banc opinion we observed that "[a] facial challenge to be successful 'must establish that no set of circumstances exists under which the Act would be valid.'" 206 F.3d at 1083-84 (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)). We did not decide the appeal on that basis, however, and made that observation in connection with explaining why one of Appellants' arguments on a subject other than the purpose of the statute was more suited to an as-applied challenge. 206 F.3d at 1083 ("Appellants also assume that allowing the senior class to vote whether to have a graduation 'message' unrestricted in content and to select an autonomous student speaker will have the effect of coercing any chosen speaker into placating the majority's religious sensibilities by offering a sectarian message of which the majority approves. This argument is highly remote and speculative [and also] would be far better suited to an as-applied challenge . . . ."). Moreover, the Court did not hold that government action violates the Establishment Clause simply by virtue of the fact that it has a non-secular purpose along with one or more secular purposes. On the contrary, the Court reiterated that under the Lemon standard, a court must invalidate a statute only if it lacks ... a secular legislative purpose. "' 120 S. Ct. at 2282 (quoting Lemon, 403 U.S. at 612) (emphasis added). The Court viewed the Santa Fe policy as having a single, wholly religious purpose and no secular purpose. See, e.g., 120 S. Ct. at 2282. By contrast, in this case the plaintiffs did not establish -- and we did not find -- a sectarian purpose. Rather, we have found, after painstaking review of the entire record, that the policy had genuinely secular purposes.

that it was not purporting to declare that the desire to solemnize so important and isolated an educational event as a graduation ceremony is never a secular purpose. On the contrary, the Court merely said that "regardless of whether one considers a sporting event an appropriate occasion for solemnity, the use of an invocation to foster such solemnity is impermissible when, in actuality, it constitutes prayer sponsored by the school." 120 S. Ct. at 2279. As discussed above, the Duval County policy does not call for an "invocation," and does not on its face sponsor prayer.

The issue before us today is extremely narrow: whether in light of Santa Fe we should alter our prior en banc decision in this case. We conclude that the answer is no. Indeed, by its reasoning Santa Fe reinforces the crucial point that "[t]he total absence of state involvement in deciding whether there will be a graduation message, who will speak, or what the speaker may say combined with the student speaker's complete autonomy over the content of the message [means] that the message delivered, be it secular or sectarian or both, is not state-sponsored." 206 F.3d at 1071.

The Court in Santa Fe had every opportunity to declare that all religious expression permitted at a public school graduation ceremony violates the Establishment Clause; it did not do so. We could not invalidate Duval County's policy, on its face, without taking the very step the Court declined to take. Santa Fe does not alter our prior en banc decision, nor does it erase the critical facts -- the complete

absence in the text of code words such as "invocation" unequivocally connoting religion, the policy's outright prohibition on state content review of non -or -anti-religious messages, the lack of any evidence (let alone stipulation as in Santa Fe) that students must vote up-or-down on prayer, and the sparseness of the record, to name a few -- that underlay our opinion. Accordingly, we reinstate our original en banc decision and judgment in favor of the County.[6]

OPINION AND JUDGMENT REINSTATED.

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[6]The Movants-'Intervenors' "motion to clarify intervention status" is denied.

KRAVITCH, Circuit Judge, dissenting, in which ANDERSON, Chief Judge, CARNES and BARKETT, Circuit Judges, join:

When the Supreme Court granted certiorari in this case and vacated this Court's en banc decision, it directed us to address the single issue whether the Duval County policy on graduation messages survives Establishment Clause scrutiny in light of the Supreme Court's decision in Santa Fe Indep . Sch. Dist. v. Doe, 530 U.S. 290 (2000). See Adler v. Duval County Sch. Bd., 121 S. Ct. 31 (2000). As a lower court, we are bound to follow rulings of the Supreme Court; thus our sole task today is to reevaluate the Duval policy in accordance with the legal principles enumerated in Santa Fe. A review of the Santa Fe decision and the record in this case convinces me that the Duval County policy is facially unconstitutional. Therefore, I respectfully dissent from the majority opinion reinstating this court's prior en banc decision.

In Santa Fe, the Supreme Court held that a school district policy permitting the student body to select by majority vote a student to deliver a "statement or invocation" prior to high school football games facially violates the Establishment Clause. 530 U.S. at 317. It further decided several corollary issues pertinent to our analysis here. First, the Court noted that the school district did not create a public forum by allowing a single student to deliver a statement or invocation prior to football games. Id. at 303 (stating that "selective access does not transform

government property into a public forum") (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n. 460 U.S. 37, 47 (1983)). This conclusion belies the assertion in this Court's prior en banc opinion that "[i]n one sense, the [Duval] policy can be analogized to a line of open forum cases in which the Supreme Court has held that neutral secular policies that merely accommodate religion or individual free exercise rights do not amount to an unconstitutional state endorsement of religion." See Adler v. Duval County Sch. Bd., 206 F.3d 1070, 1077 (11th Cir. 2000) (en banc).

Second, the Court in Santa Fe flatly rejected the school district's argument that a facial challenge to the validity of the District's policy is premature until a student actually delivers a solemnizing message under the policy. See 530 U.S. at 313-14 (explaining that even if a student never delivers a prayer pursuant to the District's policy, a constitutional violation occurs by "the mere passage ... of a policy that has the purpose and perception of governmental establishment of religion"). The Supreme Court's decision on this issue negates the proposition in this court's prior en banc opinion that because the Duval policy does not by its terms guarantee that a prayer will be delivered at every graduation, a facial challenge to the policy is premature. See Adler, 206 F.3d at 1083-84. Despite the majority's position, the Supreme Court makes clear in Santa Fe that facial Establishment Clause challenges must not focus "solely on the possible applications of the statute, but rather [on] whether the statute has an unconstitutional purpose." Santa Fe, 530 U.S. at 314 (emphasis added). This Court's

prior en banc opinion states that "[a] facial challenge to be successful 'must establish that *no* set of circumstances exists under which the Act would be valid.'" Adler, 206 F.3d at 1083-84 (emphasis in original; citation omitted). What the opinion overlooks is that, under Santa Fe, if the Duval policy has an unconstitutional purpose, then there is no set of circumstances under which the policy would be valid, notwithstanding that some of the graduation messages delivered pursuant to the policy might be totally devoid of religious content. See 530 U.S. at 314.

Finally, the Santa Fe Court explicitly determined that the election mechanism in the District's policy did not render the policy immune to constitutional scrutiny. See 530 U.S. at 304-05 ("[S]tudent elections that determine, by majority vote, which expressive activities shall receive or not receive school benefits are constitutionally problematic.... '[F]undamental rights may not be submitted to vote; they depend on the outcome of no elections.'") (citation omitted). The Supreme Court's decision on this issue renders untenable the majority's position that the Duval policy survives constitutional scrutiny because the school board "did not have control over the elements which are most crucial in the Establishment Clause calculus: the selection of the messenger, the content of the message, or most basically, the decision whether or not there would be a message in the first place." Adler, 206 F.3d at 1080. The majority's reasoning ignores the fact that Duval's "majoritarian election might ensure that *most* of the students are represented, [but] does nothing to protect the minority."

See Santa Fe, 530 U.S. at 305. Indeed, the very mechanism that the majority of this Court claims removes any impermissible coercion from the Duval policy serves to silence students espousing minority views, and forces them to participate in a state-sponsored exercise in which the message is determined by students holding majority views. The First Amendment does not permit such coercion. See id. at 317 ("Simply by establishing this school-related procedure, which entrusts the inherently nongovernmental subject of religion to a majority vote, a constitutional violation has occurred.").

Although the policy at issue in Santa Fe and the Duval policy are not identical, their few distinctions are without significant differences, such that the Supreme Court's opinion in Santa Fe compels the conclusion that the Duval policy also facially violates the Establishment Clause. A minor distinction between the Santa Fe policy and the Duval policy is that the Santa Fe policy dealt with football games, whereas the Duval policy deals with graduation. This distinction is insignificant because the Supreme Court in Santa Fe implied that graduation prayers are more offensive to the Establishment Clause than are football game prayers because "we may assume that ... the informal pressure to attend an athletic event is not as strong as a senior's desire to attend her own graduation ceremony." Id. at 311. A second distinction is that the Santa Fe policy allowed students to vote whether to have a "statement or invocation," whereas the Duval policy allows students to vote whether to have a "message." This too is a distinction

without a difference. Although a "message" is a more general type of address than an "invocation," the mere use of the less specific word "message" in its text will not shield Duval County's policy from Establishment Clause scrutiny, because such scrutiny must include an examination of the policy's purpose, history, and the context in which it was adopted to determine whether the policy has a permissible secular purpose or an impermissible religious one. See id. at 308 ("When a governmental entity professes a secular purpose for an arguably religious policy, it is nonetheless the duty of the courts to 'distinguis[h] a sham purpose from a sincere one.'") (citation omitted). "It is therefore proper, as part of this facial challenge, for us to examine the purpose of the [Duval] policy.... We [must] refuse to turn a blind eye to the context in which this policy arose, and that context quells any doubt that this policy was implemented with the purpose of endorsing school prayer." Id. at 314-15.

The majority, by extracting the core policy from the remaining text of the memorandum promulgating the policy (the "Policy Memo"),[1] ignores the mandate of the

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[1]The Policy Memo was entitled "GRADUATION PRAYERS" and stated:

"You will recall that after the 1992 Supreme court case of Lee v. Weisman [sic], you received a memorandum from me instructing that because of the decision, we would no longer be able to have prayers at graduation ceremonies. Most of you have recently been bombarded with information, as have I, regarding whether or not student initiated and led prayers are acceptable based upon a recent Fifth Circuit opinion. The purpose of this memorandum is to give you some guidelines on this issue if the graduating students at your school desire to have some type of brief opening and/or

Supreme Court that an evaluation of the purpose of a policy like Santa Fe's or Duval's is not complete without an examination of the context in which the policy was enacted. See id. at 308 ("The text and history of this policy, moreover, reinforce [the] objective student's perception that ... prayer is, in actuality, encouraged by the school."). By considering only the terms of the policy itself, the majority fails to address contextual evidence that evinces an impermissible religious purpose.

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closing message by a student.

This area of the law is far from clear at this time, and we have been threatened by lawsuits from both sides on the issue depending on what action we take. The key to the Lee v. Wiseman [sic] decision was that the prayer given at that graduation ceremony was directed and initiated by the school system, which made it unconstitutional, rather than by permissive student choice and initiative. With that premise in mind, the following guidelines may be of some assistance:

1. The use of a brief opening and/or closing message, not to exceed two minutes, at high school graduation exercises shall rest within the discretion of the graduating senior class;

2. The opening and/or closing message shall be given by a student volunteer, in the graduating senior class, chosen by the graduating senior class as a whole;

3. If the graduating senior class chooses to use an opening and/or closing message, the content of that message shall be prepare d by the student volunteer and shall not be monitored or otherwise reviewed by Duval County School Board [sic], its officers or employees;

The purpose of these guidelines is to allow students to direct their own graduation message without monitoring or review by school officials."

First, the Policy Memo is entitled "GRADUATION PRAYERS,"[2] Although a statute's title cannot limit or extend the statute's plain meaning, titles are "tools available for the resolution of a doubt." Brotherhood of R. R. Trainmen v. Baltimore & 0. R. Co., 331 U.S. 519, 529 (1947). Here, we are charged with resolving the issue whether the purpose of a school policy allowing student messages" at graduation is to endorse prayer at graduation. See Lemon v. Kurtzman, 403 U.S. 602, 612 (stating that in order to survive Establishment Clause scrutiny, a challenged provision must inter alia. "have a secular legislative purpose"). It is proper, therefore, for us to look to the Policy Memo's title in order to resolve any doubts we may have that the policy has a secular purpose. A policy with the word "prayer" in its title is more likely to have a religious purpose than a policy not similarly styled.

Second, the text of the Policy Memo indicates that the policy is intended as an "end run" around the law against state-sponsored graduation prayers set forth in Lee v. Weisman, 505 U.S. 577 (1992). The Policy Memo begins by stating that after Lee, the policy's author circulated a memo instructing that "we would no longer be able to have prayers at graduation ceremonies." The Policy Memo then presents the new issue "whether or not student initiated and

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[2]Interestingly, the policy that the Supreme Court struck down in Santa Fe did not contain the word "prayer," although earlier versions of the Santa Fe policy were entitled "Prayer at Football Games."

led prayers are acceptable" (second emphasis added), and states that "[t]he purpose of this memorandum is to give you some guidelines on this issue . . . " (emphasis added). The words "on this issue" can only mean prayer. This preamble to the Duval policy thus makes clear that the policy's purpose is to create a vehicle for the delivery of student-initiated-as contrasted with school-initiated-prayers at graduation. Indeed, the second paragraph of the policy's preamble states that the "key" to the Lee decision "was that the prayer given at that graduation ceremony was directed and initiated by the school system, which made it unconstitutional, rather than by .permissive student choice and initiative" (emphasis added). The Policy Memo then 36 sets forth the Duval policy "with that premise in mind," which indicates that the policy's purpose is to endorse student-initiated rather than school-initiated prayers at graduation, not merely to allow students to deliver a generic message.

The Duval policy's purpose of endorsing student-initiated prayer at graduation is evidenced further by the discussion among school board members during the meeting in which the board rejected a proposal to institute a "moment of silent meditation" at graduation in lieu of the policy allowing student "messages." The transcript of that meeting, which contains seventeen instances of the words "prayer," "pray," or "prayed," conveys the context in which the Duval policy implicitly was adopted, and shows that the board adopted the policy in an effort to make prayer a part

of graduation.[3] Finally, the very terms of the Duval policy belie any purpose other than that of increasing the probability that graduation ceremonies will include prayer: the student "messages" are to be delivered at the beginning or end of the ceremony (a time typically reserved for prayers), and are to be no longer than two minutes (a duration consistent with a prayer).

Because the record reflects that the purpose of the Duval policy is to endorse prayer at graduation ceremonies, and because the scheme allowing the student majority to decide whether to include prayer does not cure the problem of the policy's impermissible, religious purpose, in my view the Duval policy fails to comply with the Supreme Court's directive in Santa Fe and thus facially violates the Establishment Clause. The majority attempts to escape this conclusion by emphasizing the fact that under the Santa Fe policy, the student election was to be conducted "[u]pon the advice and direction of the high school principal," and the student speaker's message was required to be "consistent with the goals and purposes of this policy," whereas the Duval policy placed no restrictions on the election, and stated that the student's message "shall not be monitored or otherwise reviewed by Duval County School Board, its officers or employees." These distinctions do not save the

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[3]For example, one board member remarked that "in good conscience I cannot vote [in favor of] silent meditation when we all know that in the past someone has prayed out loud to thank the Lord.....

Duval policy, however, because it was enacted for the impermissible purpose of increasing the probability that a prayer will be delivered at graduation, and because the majoritarian procedure for selecting a speaker ensures that minority viewpoints will be silenced, and that those possessing such viewpoints will be forced to participate in the majority's "message." The majority opinion concludes that there is no Establishment Clause violation in this case because, according to the majority, the Santa Fe Court relied mainly on two facts, which are not present here, in reaching its result: "(1) the speech [in Santa Fe] was 'subject to particular regulations that confine the content and topic of the student's message,' and (2) the policy, 'by its terms, invites and encourages religious messages.'" (citations omitted). It was not solely the existence of two facts, however, but rather a contextual analysis of the District's entire policy, including its history and purpose, that persuaded the Santa Fe Court that the policy impermissibly coerced students to participate in a religious exercise chosen by the majority of the graduating class.

Finally, the majority opinion makes the overbroad assertion that "it is impossible to say that the Duval County policy on its face violates the Establishment Clause without effectively banning all religious speech at school graduations, no matter how private the message or how divorced the content of the message may be from any state review." This simply is not true. The Supreme Court emphasized in Santa Fe that "nothing in the Constitution as interpreted by this Court prohibits any public school

student from voluntarily praying at any time." 530 U.S. at 313; see also Adler, 206 F.3d at 1106 n.32 (Kravitch, J., dissenting) ("Nothing in this dissent suggests that all religious expression at a public high school graduation would run afoul of the Establishment Clause.... Audience members could pray quietly in their seats., and students could organize a prayer service immediately before or after the graduation ceremony."). Prayer at graduation does not by itself violate the First Amendment. If, however, "the 'degree of school involvement' makes it clear that the [graduation] prayers bear 'the imprint of the state,'" then a constitutional violation has occurred. See Santa Fe, 530 U.S. at 305 (quoting Lee, 505 U.S. at 590). A policy aimed at encouraging the delivery of a majority-selected prayer via the school's public address system at a "regularly scheduled, school-sponsored function conducted on school property," 530 U.S. at 307, does not merely facilitate the free exercise of religion; it promotes the establishment of the majority's religion,[4] and thus violates the Constitution. Therefore, respectfully I dissent.

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[4]4Because at graduation the majority-elected student delivers her message at a preordained point in a program planned by school officials who determine the place, time, attire, and all other aspects of the ceremony, "members of the listening audience must perceive the [student's] message as a public expression of the views of the majority of the student body delivered with the approval of the school administrations See Santa Fe, 530 U.S. at 308.

CARNES, Circuit Judge, dissenting, in which ANDERSON, Chief Judge, and BARKETT, Circuit Judge, join:

I join Judge Kravitch's dissenting opinion in its entirety and write separately to add a few points of my own.

When this case was last before us, I joined the majority opinion in large part because it reasoned, I thought correctly, that "[a] facial challenge to be successful 'must establish that no set of circumstances exists under which the Act would be valid,"' Adler v. Duval County School Bd., 206 F.3d 1070,1083 - 84 (I 11, Cir. 2000) (en banc) (quoting United States v. Salerno, 481 U.S. 739, 745, 107 S.Ct. 2095 (1987), and I was not convinced that had been established insofar as the Duval County policy is concerned. But the Supreme Court has now unequivocally held that principle of facial challenge law does not apply in the Establishment Clause area. Santa Fe Indep. School Dist. v. Doe, 530 U.S. 290, 313-17, 120 S.Ct. 2266, 2281-2283 (2000). Since that prop has been knocked out from under our reasoning, and in light of the additional guidance the Santa Fe decision has given us, I am persuaded that the conclusion I reached before is wrong. The Duval County "Graduation Prayers" policy is facially unconstitutional under the Establishment Clause.

In discussing what we should do with this case in light of Santa Fe, the majority opinion approaches the matter as though the question were whether Santa Fe requires us to alter our prior en banc decision in this case. That approach

is weighted too heavily in favor of inertia. The question is less about what Santa Fe requires than it is about what the Establishment Clause, read in light of Santa Fe, permits. We are not bound in any respect by our prior, vacated decision, but instead are free to revisit any and all issues addressed in it. See Moore v. Zant, 885 F.2d 1497, 1501-03 (1989) (en banc). For that reason, we ought to spend less time comparing the factual and procedural details of the Santa Fe case to this one and more time considering the lessons that decision teaches.

One of those lessons is that a school board may not delegate to the student body or some subgroup of it the power to do by majority vote what the school board itself may not do. Santa Fe, 530 U.S. at 304-12, 120 S. Ct. at 2276-80. We should apply that lesson to what we have recognized as the "elements which are most crucial in the Establishment Clause calculus." Adler 206 F.3d at 1080. We agreed when this case was last before us that the "most crucial" elements in our decision were "the selection of the messenger, the content of the message, or most basically, the decision whether or not there would be a message in the first place." Id. It is undisputable that under the Duval County policy, whether there is a message and the selection of the messenger are decided by majority vote of the students in the senior class. That means those two of the three "most crucial" elements weigh against the constitutionality of the policy, because a school board policy may not authorize a student majority to do what the Establishment Clause prohibits the board itself from doing.

The other of what we termed the three "most crucial" elements of the Establishment Clause calculus is the content of the message. In our pre-Santa Fe decision, we took refuge in what we repeatedly described as the "autonomy" of the student-selected messenger, relying upon what we characterized as her "complete autonomy" over the message. See, e.g., Adler, 206 F.3d at 1071 ("the student speaker's complete autonomy over the content of the message"); id. ("how autonomous the speaker may be in crafting her message"); id. at 1074 (it "does not violate the Establishment Clause merely because an autonomous student speaker may choose to deliver a religious message"); id. at 1077 ("The graduation policy...allows an autonomous elected speaker, selected by her class, to deliver a religious or secular message on an equal basis."); id. at 1079 ("and the student as complete autonomy over content"). That supposed autonomy is also a crucial premise of the reasoning in the present majority opinion. And a faulty one.

Santa Fe makes clear what should have been apparent all along: the messenger is not autonomous from the majority who chooses her any more than a political figure is autonomous from the majority who selects him. The majority opinion attempts to deal with this truth by characterizing the dissent as assuming that the popularly elected representative of the student majority will be "nothing more than a puppet to give voice to the student body majority's demands for prayer." Majority Op. at 21 n.2. I do not assume that any more than we assume that a

popularly elected official, selected after a one-issue campaign, will be no more than a puppet for the majority which elects him. The messenger need not be puppetized in order to serve the majority will. There will be among the majority of students who desire prayer at graduation any number of people who are more than happy to deliver the prayer themselves, just as there are some politicians who genuinely do believe in the same policies that they espouse in order to get elected.

The majority of the senior class selects and endorses the message because the majority selects the messenger. All the majority has to do to ensure that a religious message is delivered at graduation is select as its messenger one whom it can rely upon to give such a message. There is no reason at all to believe that will be difficult to do. The Supreme Court in Santa Fe presumed that there would be debate before each of two elections authorized by the policy of the school board in that case. See 530 U.S. at 310-11, 120 S.Ct. at 2279-80 ("The two student elections authorized by the policy, coupled with the debates that presumably must precede each, impermissibly invade that private sphere."). And there is no reason not to presume the same in this case. After all, that is how majority rule is typically exercised in a democratic setting. Issues are discussed and debated, and then a vote is taken to ascertain the will of the majority. Unlike the majority opinion, id. at 21 n.2. I do not think it is "pessimistic" to assume that election processes will result in selection of a representative who can be relied upon to carry out the will of the majority of those who vote. To the

contrary, faith in the notion that the majority can and will select representatives who will carry out its will is the optimistic assumption behind democracy.

It would be naive to expect the debate over the first question subjected to majority rule by the Duval County policy not to include discussion about whether there should be prayer. Prayer is what gave rise to the aptly named "Graduation Prayers" policy. Prayer is what a majority of people expect and usually want to hear at graduation. Once the majority will is expressed in favor of a student-delivered message, all the majority has to do to ensure that message includes prayer is select someone who can be counted upon to deliver a prayer. If there is any doubt about who will do so, that doubt can be resolved in the usual way that candidates' positions are identified in a democracy - through campaigning and debate. Insofar as we can tell, the policy seems to have worked as intended for the most part. Approximately sixty percent of the times when the policy has been applied, it has resulted in student-led prayer at graduation. Sixty percent is not perfection, but it is close enough for government work, and Duval County's "Graduation Prayers" policy is government work.

Duval County's "Graduation Prayers" policy may serve as a valuable teaching tool to show students how issues can be decided by majority vote and how representatives can be selected to carry out the will of the people. The problem is that because of the First Amendment religious issues are not supposed to be decided by vote of the people, and the

majority should not be allowed to force its religious views on those in the minority. Our Constitution ensures that when it comes to religion, it is the conscience of the individual rather than the will of the majority that rules. The lesson the students are being taught under the Duval County policy conflicts with the Establishment Clause.

The majority opinion concludes that no reasonable person attending a graduation ceremony could view the message the selected student delivers "as one imposed by the state." Majority Op. at 16. I believe that a reasonable person could view the message delivered by a student messenger, who is selected by a majority of the senior class to deliver the message, as one reflecting the views of the majority. And where a governmental unit, such as a school board, allows its power and authority to be wielded according to the will of a majority of students, the resulting message delivered on government property during a government-controlled event is the message of government. The government endorsement of the message comes not just from the setting in which it is delivered but also from the use of government-delegated power to select the messenger and message. The identity of the messenger is controlled and the content of the message is censored in advance through the majority selection process.

Judge Kravitch's dissenting opinion ably demonstrates that the purpose of Duval County's "Graduation Prayers" policy is consistent with its name. In disputing that, the majority opinion says the policy is not about prayer, but

instead is about student messages in general and permitting student participation in graduation ceremonies. Majority Op. at 7. I disagree. The policy is not entitled "Student Messages" or "Student Participation in Graduation," but "Graduation Prayers." There is nothing about a general student message or student participation that would cause the school board to dictate that it come at the beginning or end of the ceremony; that is, however, exactly when prayer traditionally occurs in a ceremony. And the board's mandate that the student "message" be no longer than two minutes comports nicely with the length of a good, short prayer. The memorandum that became the board's policy refers repeatedly not to free speech or democratic participation cases but to a school prayer decision. See Adler, 206 F.3d at 1072.

The "Graduation Prayers" memorandum refers to the board having "been threatened by lawsuits from both sides," id., and those threatened lawsuits were not about whether there would be student participation or a student message in general, but about whether there would be prayer. Even in our litigious society, no one sues about student participation in graduation ceremonies, but people do sue about whether prayer is allowed or prohibited at graduation and other school-related events. In response to the threats of lawsuits from both sides about whether there would be prayer at graduation, the school board sought to pass the buck to the senior class, thereby allowing the students, in the policy's words, "to direct their own graduation message without monitoring or review by school officials." Id. By

majority vote, the students direct their own graduation message by deciding whether there will be one and who will deliver it. And in that way a majority of the senior class determines whether its message will be prayer. The school board policy not just permits but invites that determination by the majority regardless of the views of the minority. As interpreted in Santa Fe, the Establishment Clause forbids that type of exercise of majority power. Government is not allowed to aid in the establishment of religion by giving a majority of students a proxy to use government power to do that which government itself may not do.

[PUBLISH]

FILED
U.S. COURT OF APPEALS
MAR 15, 2000
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

98-2709

D. C. Docket No. 98-460-CIV-J-10C

EMILY ADLER, individually; on behalf
of herself and all persons similarly situated,
SETH FINCK, individually; on behalf of
himself and all persons similarly situated, et al.,

Plaintiffs-Appellants,

versus

DUVAL COUNTY SCHOOL BOARD,
DUVAL COUNTY PUBLIC SCHOOL DISTRICT,

Defendants-Appellees.

No. 98-2720

D.C. Docket No. 98-460-CIV-J-10C

EMILY ADLER, individually; on behalf
of herself and all persons similarly situated,
SETH FINCK, individually; on behalf of
himself and all persons similarly situated, et al.,

Plaintiffs-Appellees,

versus

SUSAN BOLES, as parent & next friend of Rebecca Boles, a minor child and on behalf of all public school students within the Duval County Public School District,

Movants-Appellants.

Appeal from the United States District Court
for the Middle District of Florida

(March 15, 2000)

Before ANDERSON, Chief Judge, TJOFLAT, EDMONDSON, COX, BIRCH, DUBINA, CARNES, BARKETI, HULL, MARCUS, WILSON, Circuit Judges,* and KRAVITCH, Senior Circuit Judge.**

MARCUS, Circuit Judge:

At issue today is whether the Duval County, Florida school system's policy of permitting graduating students to vote on whether to select a student to deliver a message wholly of her own choosing at the beginning or closing of a high school graduation ceremony violates the Establishment Clause. Because the Duval County policy unambiguously recognizes the "crucial difference between government speech

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*Judge Susan H. Black did not participate in this decision.

**Senior U.S. Circuit Judge Phyllis A. Kravitch elected to participate in this. decision pursuant to 28 U.S.C. § 46(c).

endorsing religion, which the Establishment Clause forbids, and private speech [] [that may contain a prayerful message], which the Free Speech and Free Exercises Clauses protect," Board of Educ. v. Mergens, 496 U.S. 226, 250, 1 10 S.Ct. 2356, 110 L.Ed.2d 191 (1990) (emphasis added), we find the policy constitutional on its face and affirm the judgment of the district court. The total absence of state involvement in deciding whether there will be a graduation message, who will speak, or what the speaker may say combined with the student speaker's complete autonomy over the content of the message convinces us that the message delivered, be it secular or sectarian or both, is not state-sponsored. To conclude otherwise would come perilously close to announcing an absolute rule that would excise all private religious expression from a public graduation ceremony, no matter how neutral the process of selecting the speaker may be, nor how autonomous the speaker may be in crafting her message.

I.

The facts of this case are straightforward, uncontroverted, and laid out fully by the district court in Adler v. Duval County Sch. Bd., 851 F. Supp. 446, 448 (M.D. Fla. 1994) ("Adler I"). Invocations, benedictions, and other religious prayers or messages were traditionally offered, by clergy and others, at public high school commencement ceremonies in the Duval County School District. In 1992,

the Supreme Court in Lee v. Weisman, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992), held that a Providence, Rhode Island high school principal, acting in accord with school board policy, violated the Establishment Clause by inviting a local clergyman to deliver a nonsectarian prayer at graduation. In response to Lee, the Duval County Superintendent, Larry Zenke, at the behest of Vicki R. Reynolds, the school district's legal affairs officer, issued a memorandum instructing all school officials in the Duval County school system that no "prayer, benediction, or invocation" should be offered at "any graduation ceremonies."[1]

In the ensuing months, Superintendent Zenke received a number of letters from students and members of the community discussing the graduation policy. Some of these letters suggested that student-initiated, student-led prayer might be constitutional under Lee, and Zenke directed Reynolds to further research the issue. Reynolds later advised Zenke that it would be constitutional to allow student-initiated, student-led prayer during the graduation ceremony so long as the administration and faculty were not involved in the decision-making process. Zenke then authorized Reynolds to issue another memorandum (the "Reynolds Memorandum"), dated May 5, 1993, to all area

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[1]The memorandum, dated July 22, 1992, read, "[t]his memorandum is to remind you that due to the recent Supreme Court Ruling in Lee v. Weisman, there should be no prayer, benediction, or invocation at any graduation ceremonies.

high school principals. The memorandum was entitled "Graduation Prayers" and stated:

> You will recall that after the 1992 Supreme court case of Lee v. Wiseman [sic], you received a memorandum from me instructing that because of the decision, we would no longer be able to have prayers at graduation ceremonies. Most of you have recently been bombarded with information, as have I, regarding whether or not student initiated and led prayers are acceptable based upon a recent Fifth Circuit opinion. The purpose of this memorandum is to give you some guidelines on this issue if the graduating students at your school desire to have some type of brief opening and/or closing message by a student.
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> This area of the law is far from clear at this time, and we have been threatened by lawsuits from both sides on the issue depending on what action we take. The key to the Lee v. Wiseman [sic] decision was that the prayer given at that graduation ceremony was directed and initiated by the school system, which made it unconstitutional, rather than by permissive. student choice and initiative. With that premise in mind, the following guidelines may be of some assistance:
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> 1. The use of a brief opening and/or closing message, not to exceed two minutes, at high school

graduation exercises shall rest within the discretion of the graduating senior class;

2. The opening and/or closing message shall be given by a student volunteer, in the graduating senior class, chosen by the graduating senior class as a whole;

3. If the graduating senior class chooses to use an opening and/or closing message, the content of that message shall be prepared by the student volunteer and shall not be monitored or otherwise reviewed by Duval County School Board [sic], its officers or employees.

The purpose of these guidelines is to allow students to direct their own graduation message without monitoring or review by school officials.

This policy never was directly voted on or debated by the School Board.

Instead, at a June 1, 1993 School Board meeting, a motion was made to substitute a "moment of silence' for any student-initiated messages that might otherwise be given pursuant to the graduation policy announced in the Reynolds Memorandum. The motion failed by a vote of four to three. As a result, the Reynolds Memorandum was "left in force with the acquiescence or tacit approval of the Board as its official policy governing the 1993

commencement exercises." Adler I, 851 F.Supp. at 449. In 1993 under this policy, student speakers, at ten of seventeen high school graduation ceremonies, delivered some form of religious message. Notably, at the other seven graduations, there were no student messages at all or the messages were entirely secular in character. There is no tabulation in the record of comparable statistics for subsequent graduations.

In June 1993, various Duval County public school students sued the Duval County school system, alleging that the policy embodied in the Reynolds Memorandum constituted an establishment of religion and infringed on their free exercise of religion. These students sought equitable relief declaring the policy unconstitutional and enjoining the Duval County School Board from permitting prayers at high school graduation ceremonies as well as money damages. The students also sought to certify their action as a class action.[2] The district court denied the motion to certify the class and granted summary judgment in favor of the Duval County school system, holding that its policy was constitutional. See Adler I, 851 F.Supp. at 451-56. The students appealed, and a panel of this court found that because the students had all graduated, their claims for declaratory and injunctive relief were moot. See Adler v. Duval County Sch. Bd., 112 F.3d 1475, 1477-78 (11th Cir.

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[2]These original plaintiffs consisted of the following students: Leslie Adler, Laura Jaffa, and Robin Zion. Doug Rand later joined the action. Karen Adler and Robin Rand, the mothers of Leslie Adler and Doug Rand, were named as plaintiffs to bring the claims of their minor children.

1997) [hereinafter Adler II. The Adler II court also held that the students waived their damages claims on appeal. See Adler II, 112 F.3d at 1480-81. The Reynolds Memorandum thus remained the operative high school graduation policy for Duval County.

In May 1998, Appellants brought the instant action against the Duval County school system, again alleging that the policy embodied in the Reynolds Memorandum constituted an establishment of religion and infringed on their free exercise of religion. Appellants sought preliminary and permanent injunctive relief against the Duval County School Board to prevent it from permitting, conducting, or sponsoring any religious exercises or prayer and instruction within the Duval County Public School District, including at School Board-sponsored graduation ceremonies. Appellants also sought monetary damages and class certification.[3] The district court, at the hearing on Appellants' motion for a preliminary injunction and with the consent of the parties, consolidated the merits of Appellants' claims with Appellants' preliminary injunction

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[3]Appellants in the instant action include: Emily Adler, a June 1998 graduate of Mandarin High School; Seth Finck, a June 1998 graduate of Stanton College Preparatory School; Stella Finck, mother of Duval County public school students Rachel Finck, who was scheduled to graduate from Stanton College Preparatory School in 1999, Aaron Finck, who was scheduled to graduate from Stanton College Preparatory School in 2000, and Benjamin Finck, a Duval County public school student; Roberta Nord, mother of Duval County public school students Lucy Nord, age 9, and Tyler Hurley, age 12; and Jonathon Rand, a June 1998 graduate of Stanton College Preparatory School.

motion pursuant to Federal Rule of Civil Procedure 65(a)(2). The district court then denied Appellants' motion for preliminary injunction and entered final judgment in favor of the Duval County School Board.

Appellants filed a motion for expedited appeal and a panel of this Court heard oral argument on November 16, 1998. The panel reversed the district court's judgment and remanded for further proceedings. On June 2, 1999, we vacated this opinion and granted rehearing en banc.

II.

The central issue presented is whether the Duval County school system's policy of permitting a graduating student, elected by her class, to deliver an unrestricted message of her choice at the beginning and/or closing of graduation ceremonies is facially violative of the Establishment Clause. [4]

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[4]We construe this appeal as the appeal of a final judgment strictly pertaining to the facial constitutionality of the Duval County graduation policy. We do not address any potential "as-applied" claims raised below by Appellants. This result is driven by the procedural history of the case. Initially, Appellants sought a preliminary injunction in addition to their facial and as-applied claims on the merits. At the pretrial hearing on the preliminary injunction, the district court indicated that it thought that Appellant's claims on the merits should be consolidated with the preliminary injunction motion because the claims were duplications of earlier claims it had evaluated in Adler I. The district court asked whether any operative facts had changed and the parties stipulated that there had been no substantive changes. As the district court explained:

> This is, for all practical purposes, the second time this case has appeared before this court In 1994 a similar group of Plaintiffs represented by the same counsel sought the same injunctive relief with respect to high school graduation or commencement ceremonies then scheduled to be conducted in the spring of that year. I decided at that time that the Plaintiffs' constitutional rights were not infringed. This action presents precisely the same claims predicated upon the same constitutional theories or contentions; and, at today's hearing, counsel stipulated that the operative facts remain unchanged. The only factual difference is that a new series of graduation ceremonies is scheduled for 1998. The present case was filed for the purpose of relitigating the issue upon the contention of Plaintiffs' counsel that the law has now evolved in their favor as manifested by [] [several] intervening decisions....

See Adler v. Duval County Sch. Bd., No. 98- 460-CIV-J-10C (M.D.Fla. May 27, 1998) (internal citation omitted) (emphasis added). The district court then took judicial notice of its opinion in Adler I and consolidated the action on the merits with Appellants' motion for preliminary injunction. Finally, the district court distinguished the intervening decisions cited by Appellants and concluded:

> [T]he proper decision in this case is dictated by the decision I reached in Adler I, and that the application for preliminary injunctive relief should be denied now as it was then. Furthermore, as counsel agreed during today's hearing, there is no just reason in fact or law as to why the action should not be advanced on the merits and consolidated with the hearing of the instant application so that final judgment may be entered and the controversy may proceed to the Court of Appeals.

Id. (emphasis added). Both parties consented to the consolidation and Appellants did not object to the effect this consolidation would have on their as-applied claims. Because of the consolidation, discovery was truncated as to the policy's application and effect for graduation ceremonies after 1993 and Appellants' as-applied claims were never fully developed or litigated below. Appellants' consent to the district court's consolidation constituted a knowing waiver of their as-applied claims, circumscribing the action and

Close attention to the operative features of the Duval County policy yields the conclusion that the policy is constitutional on its face. Simply put, the selection of a graduation student speaker by a secular criterion (not controlled by the state) to deliver a message (not restricted in content by the state) does not violate the Establishment Clause merely because an autonomous student speaker may choose to deliver a religious message. See Lee, 505 U.S. at 630 n.8, 112 S.Ct. 2649 (Souter, J., concurring) (observing that "[i]f the State had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the State") (citing Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 106 S.Ct. 748, L.Ed.2d 846 (1986)).

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the district court's final judgment to the facial constitutionality of the graduation policy. See Warehouse Groceries Management, Inc. v. SAV-U-Warehouse Groceries, Inc., 624 F.2d 655, 657-58 (5th Cir. 1980) (noting that district court, pursuant to Federal Rule of Civil Procedure 65(a(2), may properly consolidate the merits of a case with a preliminary injunction hearing so long as parties are given adequate notice); Fenstermacher v. Philadelphia Nat'l Bank 493 F.2d 333, 337 (3rd Cir. 1974) (noting that party's failure to object to district court's consolidation of the merits with a preliminary injunction hearing constituted a waiver of any defects stemming from the consolidation because the party had "acquiesced in the procedure followed in the district court'). We therefore restrict our review today to the facial constitutionality of the graduation policy.

Establishment Clause jurisprudence calls for the difficult task of separating a student's private message, which may be religious in character, from a state sponsored religious message, protecting the former and prohibiting the latter. This determination is of "necessity one of line-drawing," see Lee, 505 U.S. at 598, 112 S.Ct. 2649, "sometimes quite fine, based on the particular facts of each case," Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 847, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) (O'Connor, J., concurring). Indeed, our courts have recognized that "at graduation time and throughout the course of the education process, there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students." See Lee , 505 U.S. at 598-99, 112 S.Ct. 2649 (citing Board of Educ. v. Mergens, 496 U.S. 226, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990)). But at the core of Establishment Clause jurisprudence is the notion that the state may not favor, endorse, or oppose the propagation of religious doctrine by its citizens. In this case, the absence of state involvement in each of the central decisions-whether a graduation message will be delivered, who may speak, and what the content of the speech may be--insulates the School Board's policy from constitutional infirmity on its face.

We measure the facial constitutionality of the policy against both the standards enunciated by the Supreme Court in Lee, 505 U.S. 577, 112 S.Ct. 2649, the Court's only occasion to directly examine the issue of school prayer at a public high school graduation, and the more general

Establishment Clause test articulated in Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971).[5]

A.

In Lee, the Supreme Court scrutinized the Providence, Rhode Island public school system policy of permitting middle and high school principals to invite clerics to offer invocation and benediction prayers at formal high school graduation ceremonies. See Lee, 505 U.S. at 580, 112 S.Ct. 2649. In particular, the Court considered the 1989 graduation at Nathan Bishop Middle School where the principal invited a local rabbi to offer a religious invocation and benediction at the school's graduation ceremony. The principal also provided the rabbi with a pamphlet entitled "Guidelines for Civic Occasions," prepared by the National

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[5]"While the Lemon test has drawn considerable criticism from both Members of the Court and legal commentators, see, e.g., Board of Educ. v. Grumet, 512 U.S. 687, 721,114 S.Ct. 2481,129 L.Ed.2d 546 (1994) (O'Connor, J., concurring) (noting that "the slide away from Lemon!s unitary approach is well under way"); Kent Greenawalt, Quo Vadis: The Status and Prospects of "Tests" Under the Religion Clauses, 1995 Sup.Ct. Rev. 323, 361 (1996) (declaring that "now that Lemon lacks any defenders on the Court, other judges would perform a shallow exercise were they to continue to apply its terms. They should recognize that the Supreme Court has definitely abandoned Lemon."), it is still binding precedent see Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 395 n.7,113 S.Ct. 2141, 124 L.Ed.2d 352 (1993) (stating that "we return to the reality that there is a proper way to inter an established decision and Lemon, however frightening it might be to some, has not been overruled"); see also Chabad-Lubavitch of Georgia v. Miller, 5 F.3d 1383, 1388 (11th Cir. 1993) (en banc) (explaining that "[a]lthough [the Lemon test] has been criticized severely, it still controls our Establishment Clause inquiry"); Bown v. Gwinnett County Sch. Dist., 112 F.3d 1464, 1468- 74 (11th Cir.1997) (applying Lemon)-

Conference of Christians and Jews, and advised the rabbi that the prayer should be nonsectarian. See id. at 581, 112 S.Ct. 2649.

In declaring the school system policy unconstitutional under the Establishment Clause, the Supreme Court pointed at two "dominant facts" as marking the boundaries of its decision: first, the Providence school officials ordained and directed the performance of a religious exercise by deciding to include prayer in the graduation ceremony, by selecting a clergyman to deliver the prayer, and by providing the clergyman with guidelines informing the content of the prayer; and second, pressure was exerted on students to attend graduation and conform with their peers by either standing as a group or remaining in respectful silence during the invocation and benediction. Id. at 586-88, 112 S.Ct. 2649. What the Supreme Court found striking and troubling about Lee was that the government clearly directed a formal religious exercise - -albeit in the form of a nonsectarian prayer--under such circumstances as to oblige the participation of many who objected. As Justice Kennedy wrote for the majority:

> These dominant facts mark and control the confines of our decision: State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools. Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious

> activity are in a fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma.

Id. at 586, 112 S.Ct. 2649. There can be little doubt, then, that in Lee the Providence, Rhode Island school system ordained and established a religious exercise at a graduation ceremony, and that the graduation prayer delivered by a rabbi was in every sense endorsed and supported by the state.

In striking contrast, under the Duval County graduation policy, however, neither the School Board nor its principals may ordain, direct, establish, or endorse a religious prayer or message of any kind. Indeed, by the very terms of the policy, a religious message may not even be offered at graduation. The Duval County policy explicitly divorces school officials from the decision-making process as to whether any message--be it religious or not--may be delivered at graduation at all. Moreover, decisional control over the most crucial elements of the graduation policy rests with the students and not the state. According to the policy, school officials merely allow a graduating class to decide by an election whether to have a "brief opening and/or closing message" at graduation. If the class votes to have a message, it elects a student volunteer to deliver the message. That student is then free to deliver a message "not monitored or otherwise reviewed" in any way by the school. Under the policy, the School Board and its

agents have no control over who will draft the message (if there be any message at all) or what its content may be. The School Board also does not suggest in any way, let alone require, that the graduating class consider religious or any other criteria in deciding whether to have a student message or in selecting a particular student speaker. And most notably, if the graduating class chooses to have a message, the content of the message shall be prepared by the student speaker alone an no one else. The Duval County School Board is expressly prohibited by the very terms of its policy from influencing or editing the message in any way.

These operational features distinguish the Duval County policy from approximating even an arguably similar level of state control to the graduation policy struck down in Lee. Unlike the Providence policy in Lee, the Duval County policy, in no way, authorizes a school to "direct the performance of a formal religious exercise." Lee, 505 U.S. at 586, 112 S.Ct. 2649. And unlike a direct student plebiscite on graduation prayer, not even the senior class exercises control over the content of the graduation message. That decision rests solely with the elected student speaker-- with neither the senior class nor the school exercising any sort of editorial oversight. Therefore, on the face of the policy itself, the students unambiguously understand that any student message is utterly divorced from any state sponsorship.

Lee does not stand for the proposition that all religious expression, even the private religious expression of an

elected student speaker, must be excised from public high school graduation ceremonies. Rather, Lee prohibits the state from ordaining, directing, endorsing, or sponsoring a religious message at such ceremonies but not from adopting neutral secular policies which simply permit the possibility of private religious expression. See id., 505 U.S. at 589, 112 S.Ct. 2649 (observing that "[t]he First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State"); id. at 604-05 (Blackmun, concurring) (explaining that "[t]he Establishment Clause proscribes public schools from 'conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred'") (quoting County of Alleghanv v. Greater Pittsburgh ACLU, 492 U.S. 573, 593, 109 S.Ct. 3086, 106 L.Ed.2d. 472 (1989)); see also Agostini v. Felton, 521 U.S. 203, 231, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (noting that there is no advancement of religion where "aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis"); Rosenberger, 515 US. at 839, 115 S.Ct 2510 (stating that ([a] central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion"); Grumet, 512 U.S. at 696, 114 S.Ct. 2481 (declaring that "'fa] proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion'") (quoting Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 792-93, 93 S.Ct. 2955, 31 L.Ed.2d 948

(1973)); Chandler v. James, 180 F.3d 1254, 1258-59, (11th Cir. 1999) (noting that "ordinarily religious speech by private parties cannot establish religion, even if it occurs in a public institution, such as a school") (citation omitted).

The School Board's policy is perfectly consistent with the theme of neutrality in Establishment Clause jurisprudence. As Justice Souter explained in his concurrence in Lee:

> While the Establishment Clause's concept of neutrality is not self-revealing, our recent cases have invested it with specific content: the State may not favor or endorse either religion generally over nonreligion or one religion over others. This principle against favoritism and endorsement has become the foundation of Establishment Clause jurisprudence, ensuring that religious belief is irrelevant to every citizen's standing in the political community....

Lee, 505 U.S. at 627, 112 S.Ct. 2649 (internal citations omitted). No feature of the Duval County policy favors or endorses religion. The graduation policy is simply content-neutral, and allows an autonomous elected speaker, selected by her class, to deliver a religious or secular message on an equal basis.

In one sense, the policy can be analogized to a line of open forum cases in which the Supreme Court has held that

neutral secular policies that merely accommodate religion or individual free exercise rights do not amount to an unconstitutional state endorsement of religion.[6] First, in Widmar v. Vincent, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981), the Court struck down a University of Missouri regulation that denied "equal access" to school facilities for religious groups as a violation of the Free Speech Clause. Id. at 274-75, 102 S.Ct. 269. In so ruling, the Court explained that an "open forum" policy, which permitted access to both religious and secular student groups in a neutral manner, did not offend the Establishment Clause because "an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices" anymore than such a policy "'committed [the University] to the goals of the Students for a Democratic Society, the Young Socialist Alliance,' or any other group eligible to use its facilities." Id. at 274, 102 S.Ct. 269 (citation omitted).

The Supreme Court extended this reasoning to public secondary schools in Mergens. There, the Court upheld the constitutionality of the Equal Access Act, 20 U.S.C. § 4071 et seq., which explicitly codified the reasoning of Widmar by prohibiting public secondary schools in receipt of federal

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[6]For purposes of our decision, we find it unnecessary to decide whether the Duval County graduation policy creates a "designated public forum" or a "nonpublic forum" as these terms have come to be defined by our public forum caselaw. See Arkansas Educ. Tele. Comm'n v. Forbes, 523 U.S. 666,118 S.Ct. 1633,1641-43,140 L.Ed.2d 875 (1998). We rely on public forum doctrine only in so far as it informs Establishment Clause jurisprudence regarding principles of state endorsement and neutral accommodation towards private religious speech.

funds from denying student access to "limited open forum[s]" on the basis of the religious content of their speech. Mergens, 496 U.S. at 235, 110 S.Ct. 2356. The Court elaborated a core tenet of its neutrality jurisprudence in the process:

> [T]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis.... Although a school may not itself lead or direct a religious club, a school that permits a student-initiated and student-led religious club to meet after school, just as it permits any other student group to do, does not convey a message of state approval or endorsement of the particular religion.

Id. at 250-52, 110 S.Ct. 2356. In recent years, the Court has reaffirmed this principle by finding that the inclusion of private religious groups in "open forums" through neutral selection principles does not violate the Establishment Clause or constitute a state endorsement of religion. See Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 763, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995) (plurality opinion) (concluding that the allowance of a private

religious display in an open public forum, selected by the same application process and on the same terms as other private displays, did not amount to state endorsement); Rosenberger, 515 U.S. at 832, 115 S.Ct. 2510 (holding that a public university subsidy for a religious student organization's publication costs, under a program that funded other student organization publications through neutral selection criteria, did not violate the Establishment Clause); Lamb's Chapel,. 508 U.S. at 395, 113 S.Ct. 2141 (finding that a policy, which allowed private student religious groups equal after-school access to school property through neutral secular criteria, would not violate the Establishment Clause).

These cases strongly suggest that a policy, like the Duval County graduation policy, which provides an opportunity for student-selected, student-initiated private expression through a neutral selection criterion, does not violate the Establishment Clause simply because the venue is equally available for religious or secular expression. Government neutrality towards religion is all that is required by the Establishment Clause. And it is worth emphasizing that while the state must be neutral and cannot advance or endorse religion, similarly, it need not, indeed it cannot, act in a hostile manner in the face of private religious speech publically uttered. See Lee. 505 U.S. at 598, 112 S.Ct. 2649 (observing that "[a] relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution') (citation omitted); Zorach v. Clauson, 343 U.S.

306, 314, 72 S.Ct. 679, 96 L.Ed. 954 (1952) (stating that "we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence").

In essence, this case is substantially like Doe v. Madison Sch. Dist. No. 321, 147 F.3d 832 (9th Cir. 1998), vacated on other grounds , 177 F.3d 789 (9th Cir. 1999) (en banc) (vacating for mootness because the student plaintiffs already had graduated). In Doe, the Ninth Circuit examined a graduation policy which mirrors Duval County's policy in its neutrality. The Doe policy allowed for a minimum of four student graduation speakers to be selected according to their academic standing. If a student accepted the speaking invitation, she could choose to deliver an "address, poem, reading, song, musical presentation, prayer, or any other pronouncement" -- the content, of which, she alone controlled. Doe, *147* F.3d at 835. The Doe court upheld the constitutionality of the policy against a facial challenge on Establishment Clause grounds and distinguished Lee. It explained that graduation speech does not bear the imprimatur of the state when the speaker is a student, not a cleric; the student speaker is selected on neutral and secular criteria; and the student has complete autonomy over content. Doe, 147 F.3d at 835-36.[7]

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[7]The other federal circuit cases that have considered student-led, student initiated prayer at graduation are of limited assistance. All of these cases involve direct student plebiscites on graduation prayer. Of these

cases, Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963 (5th Cir. 1992), is the only one which has permitted students to vote directly on whether to have prayer at graduation. In Jones, the Fifth Circuit upheld the Clear Creek, Texas school district's policy allowing graduating students to vote whether student volunteers would deliver "nonsectarian and nonproselytizing" invocations at graduation. The court found: that the Clear Creek policy (1) reserved to the students the decision whether to have an invocation, (2) precluded anyone but a student volunteer from delivering an invocation, and (3) placed less psychological coercion on the student audience than the prayers given in Lee because students were aware that any prayers given represented the will of their peers. See id. at 970-71.

Both the Third and Ninth Circuits have come to an opposite conclusion. In ACLU of New Jersey. Black Horse Pike Regional Bd. of Educ., 84 F.3d 1471 (3d Cir. 1996) (en banc), the Third Circuit, sitting en banc, held as unconstitutional a school board's policy that permitted the senior class to vote on whether to include a prayer at high school graduation ceremonies. See id. at 1477-88. The policy in Black Horse Pike allowed senior class officers to conduct a poll of the graduating class to determine, by plurality vote, whether seniors wanted "'prayer, a moment of reflection, or nothing at all'" to be included in their graduation ceremony. Id. at 1475 (citation omitted). In Harris v. Joint Sch. Dist. No. 241, 41 F.3d 447 (9th Cir. 1994), vacated as moot, 515 U.S. 1154, 115 S.Ct. 2604, 132 L.Ed.2d 849 (1995), high school students themselves, pursuant to a school district policy, planned every aspect of their graduation, without interference from school officials, and voted by written ballot on whether or not to have prayer. The Harris court found that the state involvement in the case was pervasive enough to offend Establishment Clause concerns, noting that "[t]he message of the speakers is [] chosen by the majority; the relevant speakers are instructed to pray." Id. at 456-57.

In contrast to each of these policies, Duval County students vote on whether to have a message of unspecified content delivered by a student. This is a meaningful distinction.

The Fifth Circuit recently revisited the issue of student-initiated prayer in Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806 (5th Cir.), cert. granted in part, 118 S.Ct. 494 (1999). There, the Fifth Circuit examined what it considered to bathe holding of Jones--"that student-selected, student-given, nonsectarian, nonproselytizing invocations and benedictions at high school graduation ceremonies" are constitutional--and concluded that the

Appellants, however, advance two arguments for why we should regard a student-selected graduation speaker, who is selected through a wholly neutral process and who is given complete autonomy over the content of her speech, as a public, state-sponsored speaker. First, they contend that by providing the platform and opportunity, the state has created a sufficient link to the student speaker to convert the student's private speech into public, state-sponsored speech. Second, they suggest that the majoritarian process of selecting the speaker shrouds the otherwise private speech

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constitutionality of a student-selected, student led prayer policy depends on its "nonsectarian and nonproselytizing" features. Id. at 816-19. The Santa Fe court also struck down a school policy which allowed student-led, student-initiated prayer before high school football games. The Supreme Court recently has granted certiorari in Santa Fe. However, the Court has limited its review to whether student-led, student initiated prayer at football games violates the Establishment Clause. The Court did not grant certiorari on the constitutionality of the Santa Fe graduation policy. Appellants cite Santa Fe for the proposition that a policy which "permits" sectarian and proselytizing prayers, is facially unconstitutional. As discussed in greater detail infra, this argument proves too much and is offensive to the Constitution. The Duval County policy, of course, permits sectarian and proselytizing prayers because it places no limitations, either secular or sectarian, on the content of a graduation message. A policy of free expression is far more consonant with the commands of the First Amendment than is a policy of censorship. See, e.g., Mergens, 496 U.S. at 253 (stating that "a denial of equal access to religious speech might well create greater entanglement problems in the form of invasive monitoring to prevent religious speech at meetings at which such speech might occur'); Santa Fe, 168 F.3d at 829-35 (Jolly, J., dissenting).

argument--that by providing the platform, the speech becomes public--goes too far. The second argument--that the speaker somehow gainers state authority by virtue of the plebiscite--has no logical rationale.

First, we reject the notion that the religious content of speech at a graduation ceremony is attributable to the school merely because of the school's sponsorship of the event or its control over the graduation's schedule, timing, decorum, or sequence of events. The Supreme Court did not suggest in Lee that school sponsorship of the graduation event, standing alone, was sufficient to find the Providence policy unconstitutional, or it would have banned all religious expression at graduation. If Appellants were right on this point, graduation speakers as diverse as athletes, politicians, academics, entertainers, and maybe even judges would bear the imprimatur of the state because they were handpicked by the school (or, in our case, elected by the senior class) to speak at an event over which the school has great control. Schools then would have to prevent these speakers from discussing a religious topic, engaging in prayer, or imploring the guidance of the Lord, to ensure no Establishment Clause violation and protect themselves from 42 U.S.C. § 1983 liability should an audience member perceive the school to be endorsing the speaker's religious message. Indeed, the same logic would apply to a student graduation speaker selected by other neutral criteria such as academic achievement. But a graduation free of all religious expression, compelled by the school's sponsorship of the event is not required by the Establishment Clause.

Even if we accept that the Duval County School Board exerted overwhelming control over the graduation ceremony in terms of the event's sequence, venue, dress, and facilities, it is clear that it did not have control over the elements which are most crucial in the Establishment Clause calculus: the selection of the messenger, the content of the message, or most basically, the decision whether or not there would be a message in the first place. It is beyond imagination to say that everyone on the platform at a high school graduation ceremony, including a local politician or celebrity, is a state speaker merely because the state has provided the platform, onto which private individuals may be invited to share their privately-held views. Such views do not become the state's views merely by being uttered at a state event on a state platform. Otherwise, each "open forum"case in which the Supreme Court found that granting religious groups access to generally available public facilities or benefits through neutral selection criteria was not an unconstitutional state endorsement of religion would be wrongly decided. See Pinette. 515 U.S. at 762-70, 115 S.Ct. 2440; id. at 772-83, 115 S.Ct. 2440 (O' Connor, J., concurring in the judgment); id. at 783-94, 115 S.Ct. 2440 (Souter, J., concurring in the judgment); Rosenberger, 515 U.S. at 839-46, 115 S.Ct. 2510; Lamb's Chapel, 508 U.S. at 395-97, 113 S.Ct. 2441; Mergens, 496 U.S. at 248-53, 110 S.Ct. 2356; Widrnar, 454 U.S. at 271-79, 102 S.Ct. 269. For by Appellants' logic, the mere provision of a state-controlled forum or subsidy to private speakers automatically converts private speech into government speech.

In addition, a per se rule that all speech on a state-controlled platform is state speech, raises core free expression concerns and would likely run afoul of the Free Exercise and Free Speech clauses. See Chandler, 180 F.3d at 1261 (stating that "[b]ecause genuinely student-initiated religious speech is private speech endorsing religion, it is fully protected by both the Free Exercise and Free Speech Clauses of the Constitution"') (emphasis added). Even if we were to construe a graduation ceremony as a "nonpublic forum," Duval County students still would possess free speech rights there. The Supreme Court has consistently held that in nonpublic fora the government may not engage in viewpoint discrimination. See Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 806, 105 S.Ct 3439, 87 L.Ed.2d 567 (1985) (finding that "[c]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral") (emphasis added); Perry Educ. Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 46, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983) (observing that "the state may reserve [] [a nonpublic] forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view"). The Court has also concluded that religion is a viewpoint which, for First Amendment purposes, may provide "a specific premise, a perspective, a standpoint from which a variety of subjects may be

discussed and considered." Rosenberger, 515 U.S. at 831, 115 S.Ct. 2510.

Presumably, a student's religious perspective would inform his views on a variety of subjects ordinarily dealt with at graduation such as expressing gratitude to his family or religious community, reflecting on the meaning of his school experience, or defining his future goals. The extremely personal and subjective nature of such views helps to explain why the School Board policy yields private rather than public speech. To unnecessarily classify student speakers as government actors could render Duval County students powerless to express religiously-inspired or religiously-influenced opinions at graduation. It also would effectively compel the Duval County School Board, if it wants to have any speech on topics where religion might motivate opinion or mould perspective, to engage in viewpoint discrimination, "an egregious form of content discrimination," Rosenberger, 515 U.S. at 829, 115 S.Ct. 2510, in the name of secular purity.

The expression of religious beliefs, which are sacred to some listeners, may be offensive to others. Appellants' desire to insulate students and other attendants at graduation from the offense that they may well experience at hearing religious expression with which they strongly disagree is altogether understandable. Graduation ceremonies are designed to be joyous occasions for the celebration of student achievement. But the Constitution does not prohibit the exercise of offensive speech at

graduation ceremonies, religious or otherwise; it only prohibits state expressions of religion. While the School Board is under no compulsion to provide an opportunity for free expression by one or more students at a graduation ceremony, the Constitution certainly does not prohibit the School Board from doing so. The occasional tolerance of speech we may deem offensive is one price we pay for the First Amendment and our democratic traditions.

Second, we reject the claim that allowing students to vote for a graduation message and to select the student speakers automatically places the imprint of the state on the student speakers' privately-crafted messages. Appellants' leap of logic, taking a selected student representative and, without explanation, turning her into a state actor by virtue of a democratic student vote, strains credulity. At most, a student speaker selected by a class vote is a representative of the student body, not an official of the state. She has no power or authority or official capacity to inform, carry out, or guide state policy. It is wholly unconvincing to argue that the student becomes a state actor because she was chosen by her peers, unless each high school student individually is considered to be a state actor, or somehow the students, acting in concert, come to be vested with the power of the state.

Consider two examples. First, consider the case of the selection of a Homecoming Queen. While she may be selected by a vote, or plebiscite of the entire senior class, the Homecoming Queen cannot be characterized as a state

actor, or a representative of the state, merely because she holds a "public" position and sits atop the Homecoming float. Imagine, second, the example of replacing the traditional valedictory address with the practice of affording the students of the graduating class the opportunity to select the graduation student speaker through a vote by the entire class. In this hypothetical, the student speaker is selected, not by the School Board on the basis of grades, but by the students on the basis of student choice – be it popularity, ability to entertain, achievement in athletics, or for some other reason. Again, it strains reason and common sense to suggest that, by virtue of her selection by the majority of the senior high school class, the student speaker becomes a mouthpiece of the state. Both examples suggest that the senior class's act of voting does not, in any way, turn the senior class vote into state action, nor turn the chosen student into a state actor. Because Duval County policy utilizes this same methodology, affording the students of the senior class the opportunity to vote whether or not to have a message and to select a student speaker, in a wholly secular way, the graduation message vote is no more vested with the imprimatur of the state than are the votes for graduation class speaker or Homecoming Queen.

While the line between "what is 'private' action and what is 'state' action is not always easy to determine," Appellants have in no way proven that the students' private conduct has become so "entwined with government policies" or so "impregnated with governmental character" as to become subject to the constitutional limitations placed

on state action. Evans v. Newton, 382 U.S. 296, 299, 86 S.Ct. 486, 15 L.Ed.2d 373 (1966) (citing Burton v. Wilmington Parking Auth., 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961)). All of the policy's central decisions -- who speaks, whether there will be a speaker, and what the content of the speech may be -- are uncontrolled by the state. Indeed, the Duval County policy itself states that its purpose is "to allow students to direct their own graduation message without monitoring or review by school officials." The mere delegation of decision-making to pick a speaker alone does not place the state's imprint on a graduation prayer delivered by an autonomous student speaker who is free to give a message of unrestricted content.

In fact, the state's only involvement in the graduation message is to provide students with the opportunity to vote, to impose a time limit of two minutes, and to direct that the message be delivered at the beginning and/or closing of the ceremony. If the senior class were asked to vote whether to have a student deliver a poem or sing a song at their graduation exercise, under the same time and sequence restraints of the Duval County graduation message policy, that act still would involve the selection of a private, autonomous speaker through a neutral criterion. The Duval County policy does nothing more. It simply creates a neutral mechanism whereby the students can elect to have an unrestricted message and select a student speaker.

These facts do not establish that the state has so insinuated itself into the decision so as to transform an

elected student's private speech into an utterance of the state. Where the student is chosen in a neutral and secular way and where the student is allowed complete autonomy over the message, the student's speech is her own.

B.

The other dominant fact of Lee - whether Duval County students are coerced "to support or participate in religion or its exercise'" by the School Board policy, 505 U.S. at 587, 112 S.Ct. 2649--is largely determined by the measure of state control over the message at a graduation ceremony, rather than state control over the ceremony itself. We do not quarrel with the Court's suggestion in Lee that students feel compelled to attend graduation, see id. at 593-97, 112 S.Ct. 2649, and that schools "retain a high degree of control" over graduation ceremonies, id. at 597, 112 S.Ct. 2649. But these conclusions do not suffice to decide the issue of coercion under these circumstances. The focus must be on whether the state has endorsed the message in an appreciable manner, which, when combined with the inherent nature of the graduation ceremony, obliges students to participate in a religious exercise. See Lee, 505 U.S. at 594, 112 S.Ct. 2649 (explaining that "[t]he injury caused by the government's action ... is that the State, in a school setting, in effect required participation in a religious exercise").

Here, neither the Duval County schools nor the graduating senior classes even decide if a religious prayer or

message will be delivered, let alone "require" or "coerce" the student audience to participate in any privately-crafted message. While schools may make private religious speech their own by endorsing it, schools do not endorse all speech that they do not censor. We cannot assume, as Appellants do, that Duval County seniors will interpret the school's failure to censor a private student message for religious content as an endorsement of that message--particularly where the students are expressly informed as part of the election process that they may select a speaker who alone will craft any message. While there may be pressures on students to attend graduation and conform with their peers, see Lee, 505 U.S. at 593-95, 112 S.Ct. 2649, the state's complete control over a religious exercise, essential to Lee's holding, see id. at 590, 112 S.Ct 2649 (finding that "[t]he degree of school involvement here made it clear that the graduation prayers bore the imprint of the State . . ."); id. at 597, 112 S.Ct. 2649 (noting that "the state-imposed character of an invocation and benediction by clergy selected by the school combine to make the prayer a state-sanctioned religious exercise . . ."), is conspicuously absent here. Moreover, whatever majoritarian pressures are attendant to a student-led prayer pursuant to a direct student plebiscite on prayer are not facially presented by the Duval County policy.

Appellants also assume that allowing the senior class to vote whether to have a graduation "message" unrestricted in content and to select an autonomous student speaker will have the effect of coercing any chosen speaker

into placating the majority's religious sensibilities by offering a sectarian message of which the majority approves. This argument is highly remote and speculative. Even the scant record before us suggests an opposite conclusion. While ten of the graduation messages delivered pursuant to the policy involved some sort of religious content, the other seven Duval County graduations either had no student message or a wholly secular message. In the second place, this argument would be far better suited to an as-applied challenge, where the record has been properly developed, rather than to a facial challenge. A facial challenge to be successful "must establish that no set of circumstances exists under which the Act would be valid." United States v. Salerno, 481 U.S. 739, 745, 107 S.Ct 2095, 95 L.Ed.2d 697 (1987) (emphasis added). Appellants' argument simply ignores the plain text of the policy which only permits graduating students to decide through a vote whether a student volunteer shall give a message of her choice. No religious result is preordained under the policy. On its face, the policy is constitutional under Lee.

II.

We reach the same conclusion when the graduation policy is measured against the three-part Lemon test. Under Lemon, we must evaluate whether: first, the policy has a secular purpose; second, the policy has a primary effect that neither advances nor inhibits religion; and finally, the policy fosters an excessive government entanglement with religion. See Lemon, 403 U.S. at 612-13, 91 S.Ct. 2105.

A.

We begin with the policy's purpose. Lemon requires that a statute must have "a secular legislative purpose." 403 U.S. at 612, 91 S.Ct. 2105. A statute will only violate this prong if it is "entirely motivated by a purpose to advance religion." Wallace v. Jaffree, 472 U.S. 38, 56, 105 S.Ct. 2479, 86 L.Ed.2d 29 (I985); see also Bowen v. Kendrick, 487 U.S. 589, 602, 108 S.Ct. 2562, 101 L.Ed.2d 520 (1988) (stating that a court "may invalidate a statute only if it is motivated wholly by an impermissible purpose") (citations omitted); Lynch v. Donnelly, 465 U.S. 668, 680, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) (observing that "[t]he Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations"). A statute may satisfy Lemon's first prong even if it is "motivated in part by a religious purpose." Wallace, 472 U.S. at 56, 105 S.Ct. 2479.

Moreover, the Supreme Court has instructed us to be "deferential to a State's articulation of a secular purpose," Edwards v. Aguillard, 482 U.S. 578, 586, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987), particularly where "a legislature expresses a plausible secular purpose" for a policy or action, Wallace, 472 U.S. at 74, 105 S.Ct. 2479 (O'Connor, J., concurring in the judgment). We respect that purpose unless it is insincere or a "sham," Edwards, 482 U.S. at 586-87, 107 S.Ct. 2573; Bown, 112 F.3d at 1468, or the statute at

issue has a "preeminent purpose" which is "plainly religious in nature," Stone v. Graham, 449 U.S. 39, 4 1, I01 S.Ct. .192, 66 L.Ed.2d 199 (1980) (per curiam); see also Edwards, 482 U.S. at 591, 107 S.Ct. 2573; Wallace, 472 U.S. at 56-60, 105 S.Ct 2479. But the Supreme Court has been reluctant to attribute an unconstitutional motive where a "plausible" secular purpose may be discerned from the statute. Mueller v. Allen, 463 U.S. 388,394-95 & n.4, 103 S.Ct. 3062, 77 L.Ed.2d 721 (1983).

Additionally, "[i]nquiry into legislative purpose begins with interpreting the law itself " Church of Scientology v. City of Clearwater, 2 F.3d 1514, 1527 (11th Cir. 1993). That requires close attention be paid to the plain language of the policy. For the most part, statutes which the Supreme Court has invalidated for lack of secular purpose have openly favored religion or demonstrated a religious purpose on their face. See, e.g., Edwards, 482 U.S. at 593, 107 S.Ct. 2573 (invalidating a Louisiana law that required creationism to be discussed with evolution in public schools); Wallace, 472 U.S. at 57-58, 105 S.Ct. 2479 (overturning an Alabama statute that authorized a moment of silence because the state made no attempt to justify the statute in terms of any secular purpose); Stone, 449 U.S. at 4 1, I01 S.Ct. 192 (striking down a Kentucky statute requiring the posting of the Ten Commandments in public classrooms); Engel v. Vitale, 3 70 U.S. 421, 424, 82 S.Ct 1261, 8 L.Ed.2d 601 (1962) (holding unconstitutional a New York law authorizing state-directed daily classroom prayer in public schools).

In contrast, three secular purposes are plainly encompassed by the Duval County policy. First, the Duval County policy, by its very words, articulates a secular purpose; namely, affording graduating students an opportunity to direct their own graduation ceremony by selecting a student speaker to express a message. By choosing whether to have a graduation message, and if so, the student speaker, the graduating class shares, at least in part, in the civic responsibility of planning their graduation ceremony. See Jones, 977 F.2d at 966 (finding that "[a] meaningful graduation ceremony can provide encouragement to finish school and the inspiration and self-assurance necessary to achieve after graduation, which are secular objectives").

Second, the School Board policy allows students to solemnize graduation as a seminal educational experience. See Lynch, 465 U.S. at 693, 104 S.Ct. 1355 (O'Connor, J., concurring) (noting "the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society"); see also Chaudhuri v. Tennessee, 130 F.3d 232, 236 (6th Cir.1997); Tanford v. Brand, 104 F.3d 982, 986 (7th Cir. 1997); Jones, 977 F.2d at 966-67. This purpose is not drained of its secular character merely because the policy invites consideration of meaning and values in the context of a graduation ceremony. And it would be very damaging to public education if the Establishment Clause were to be seen as inhibiting any

reflection by a student of transcendent meaning and value in life, whether grounded in religion or not.

Finally, the School Board's policy also evinces an important and long accepted secular interest in permitting student freedom of expression, whether the content of the expression takes a secular or religious form. See Pinette, 515 U.S. at 760, 115 S.Ct. 2440 (noting that "[o]ur precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression"); Mergens, 496 U.S. at 249, 110 S.Ct. 2356 (stating that "prevent[ing] discrimination against religious and other types of speech" has an "undeniably secular" purpose.); Americans United For Separation of Church and State v. City of Grand Rapids, 980 F.2d 1538,1543 (6th Cir. 1992) (en banc) (explaining that a "policy of treating religious speech the same as all other speech certainly serves a secular purpose").

Nevertheless, Appellants suggest that the policy has no true secular purpose and they posit three arguments to show that any avowed secular purpose is actually a "sham." They claim first, that the School Board promulgated the policy as a means to evade the strictures of Lee; second, that the policy's solely sectarian purpose is established by the title of the Reynolds Memorandum, "Graduation Prayer"; and finally, that comments made by some members of the School Board, notably after the policy had been

promulgated and distributed in Duval County, likewise evince a wholly sectarian purpose.

Before examining Appellants' specific claims, we first note that Appellants, without any case authority, ignore the plain text of the policy and its explicitly stated secular purpose, as if there were none. Appellants would divine a wholly sectarian purpose merely by looking at the antecedent history, the title, and the post-enactment debate surrounding the graduation policy. While it is appropriate to consider both the "legislative history and the specific sequence of events leading up to the adoption of the statute," it is, "of course, necessary to examine the language of the statute on its face." Bown, 112 F.3d at 1469 (citing Edwards, 482 U.S. at 594, 107 S.Ct. at 2583; Church of Scientology, 2 F.3d at 1527).

As for Appellants' first claim, Appellants cite no persuasive evidence that the Duval County policy was promulgated to evade the strictures of Lee. Inferring the subjective motivations of policymakers is always a tricky proposition. "[W]hile it is possible to discern the objective 'purpose' of a statute (i.e., the public good at which its provisions appear to be directed), or even the formal motivation for a statute where that is explicitly set forth, ... discerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task. The number of possible motivations, to begin with, is not binary, or indeed finite." Edwards v. Aguillard, 482 U.S. 578,

636-37, 107 S.Ct 2573, 96 L.Ed.2d 510 (1987) (Scalia, J., dissenting).

In this case, that task is made even more difficult because we have no record from which to fairly infer the motivation of those who promulgated or distributed the policy. In so far as we attempt to divine purpose from the decision-makers, "to the extent that the School Board was the institutional policy maker (rather than Superintendent Zenke and/or Ms. Reynolds)," the district court found that the "purposes or intentions of the members of the Board are unknown. No debate was had and no vote was taken on the Reynolds Memorandum of May 5." Adler I, 851 F.Supp. at 451. To the extent that we focus on the motives of Mr. Zenke or Ms. Reynolds, the district court found mixed motives or purposes--to permit students to solemnize the event, to afford the student body the opportunity to select a messenger, who, in turn would, with complete autonomy, choose a secular or sectarian message, and to afford the students the option of having no message at all. See id. at 452.

Appellants offer no good reason to disturb the district court's findings which are grounded in the facially neutral language of the Reynolds Memorandum. Appellants principally rely on the pre-policy history. A review of the pertinent history, however, yields only the observations that prior to Lee Duval County had a long tradition of clergymen offering prayers at commencement ceremonies, that in the wake of Lee in 1992 the School Board terminated the

practice, and that thereafter many members of the community expressed strong views about the policy one way or the other. Appellants highlight the fact that some community members wrote letters imploring Zenke and the Board to find a way to maintain the graduation prayer tradition. It would be an especially dangerous practice if a court could somehow discern legislative purpose, not from the text of the policy, nor from its explicitly stated purpose, nor even from a decision-making body that has offered no debate from which to find purpose, but, rather, simply from the controversy surrounding the subject and the heartfelt and often conflicting views expressed by many members of the community.

In addition, the fact that the Reynolds Memorandum discusses Lee and the question of whether student-initiated, student-led graduation prayer is constitutional does not establish that the policy's secular purposes are a "sham." Edwards, 482 U.S. at 586-87, 107 S.Ct. 2573; Bown, 112 F.3d at 1468. There is nothing inappropriate about a school system attempting to understand its constitutional obligations and to instruct school officials on how to comply with the law. The Reynolds Memorandum simply explained that in spite of Lee the law was unclear on the student prayer issue and that the School Board had been threatened with "lawsuits from both sides on the issue depending on what action" they took. The memorandum, in no way, expressed a desire or preference for student prayer at graduation ceremonies. It simply acknowledged that Lee forbade graduation prayers "directed and initiated by the

school system" rather than student-initiated, student-led prayers. Moreover, as the memorandum made clear, the policy's stated purpose is plainly secular, "to allow students to direct their own graduation message without monitoring or review by school officials," and its features are strictly content-neutral and equally accommodating of secular and sectarian student messages. At worst, the memorandum can be read as contemplating that student prayers could be offered pursuant to the graduation policy and that such occurrences were not strictly forbidden by Lee. Such a supposition does not come close to rendering the policy's secular purposes a sham.

Appellants next suggest that the title of the Reynolds Memorandum, "Graduation Prayer," supports the conclusion that the School Board policy was driven solely by sectarian concerns. The title, however, merely introduces the topic of debate within Duval County in the aftermath of Lee rather than suggesting, let alone compelling, the outcome of that debate. The title affixed to the Reynolds Memorandum does no more than alert the reader to the general subject matter of the text; and it remains the language and substance of the policy, rather than its title, that is controlling. It is altogether unnecessary to requisition the title to cast doubt on the clear and unambiguous purpose of the policy. The crucial term "message" is fully defined by the text of the policy, which provides that the decision whether to have a message is left to the students, that the student body shall choose the student speaker, that the message is limited to two minutes in length, that the

message shall take place at the beginning and/or closing of the graduation ceremony, and, finally, that the content of the message shall be prepared by the student speaker without monitoring or review by the School Board. The title cannot take the place of a detailed review of the policy's facial provisions, let alone create a wholly sectarian purpose out of a textually neutral pronouncement.

Besides being unnecessary, use of the title to inform the plain meaning of the policy's language is improper. Indeed, even if we were examining the title of a statute or legislative codification--and we are doing far less than that here-- the Supreme Court has warned that "the title of a statute and the heading of a section cannot limit the plain meaning of the text. For interpretive purposes, they are of use only when they shed light on some ambiguous word or phrase. They are but tools available for the resolution of a doubt. But they cannot undo or limit that which the text makes plain." Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R, Co., 331 U.S. 519, 528-29, 67 S.Ct. 1387, 91 L.Ed. 1646 (1947). Both we and our predecessor court have repeatedly employed this principle of statutory construction when interpreting the statutory text. See, e.g., North Ala. Express, Inc. v. Interstate Commerce Comm'n, 971 F.2d 661, 664 (11th Cir. 1 992) (declaring that "'[s]ection and chapter titles cannot alter the plain meaning of a statute; they can only assist in clarifying ambiguity'") (citation omitted); Scarborough v. Office of Personnel Management, 723 F.2d 801, 817 (11th Cir. 1984) (noting that "reliance upon headings to determine the meaning of a statute is not a

favored method of statutory construction"); Rich v. Commissioner of Internal Revenue Serv., 250 F.2d 170, 175 (5th Cir. 1957) (stating that "[t]he plain and unambiguous meaning of the text of the section cannot be extended by its title or heading").

Finally, Appellants point to post-enactment comments of some members of the School Board made at a June 1, 1993 meeting as evidence of the School Board's wholly sectarian purpose to permit graduating students to pray. However, the district court observed that "[t]he motivation or intent of the Board relative to the Reynolds Memorandum of May 5 is essentially unknown." Adler I, 851 F.Supp. at 452. No debate was had and as far as the record reflects, no vote was taken on the Reynolds Memorandum. The June 1 comments were made almost a month after the policy was promulgated and distributed in the context of a proposal to replace student-initiated messages with a moment of silence. The motion failed and the policy was left in force. At best, the vote can be viewed as a tacit endorsement of the Reynolds Memorandum. Furthermore, a review of the School Board's comments at this meeting do not establish that the School Board sought to direct or endorse graduation prayer via the Reynold Memorandum. The most one could say is that the statement of one School Board member at the June 1 meeting could be characterized as advocating direct school involvement with religion at graduation ceremonies.[8]

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[8]Appellants cite to four post-enactment statements of School Board members to show that the School Board intended to permit graduating

Simply put, the post-enactment comments are not sufficient to transform the policy's express secular purpose into a preeminently religious purpose.

More importantly, regardless of how these post hoc statements are interpreted, they cannot be construed to override the policy's language articulating a clear secular purpose. See Bown, 112 F.3d at 1472. Indeed in Bown, we had occasion to find that the legislative history of a Georgia statute (mandating a period for quiet reflection in public

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students to engage in prayer. In fact, the statements to which the Appellants refer generally buttress the conclusion that the School Board's policy was not a sham. Of those four statements, only the statement of Board member Bill Parker can be characterized as advocating direct school involvement with religion at graduation ceremonies. see Tr. of Duval County Sch. Bd. Meeting at 2 ("I think that our school principals should be allowed to work out a non-sectarian message with our student chaplains, or a guest minister, rabbi or whatever that would be acceptable to all at this very important time in our young people's lives."). The statements of Don Buckley and Nancy Corwin, while generally supportive of religion, acknowledge that an intended effect of the policy is to insulate the content of messages from school influence. See id. at 5 (Buckley) ("I think the only way we can keep ourselves clear on this thing is to keep ourselves out of what happens in this area of the graduation ceremony."); (Corwin) ("I also believe that the democratic process in which seniors were given the ability to choose which form of inspirational message, if any, they wanted at their commencement was an appropriate one and I'm going to stand by it."). Rather than betraying an illegitimate intent to ensure that prayer take place at graduation ceremonies, these statements indicate that Buckley and Corwin perceived the School Board policy as disassociating the school hierarchy from student messages. The fourth statement referenced by Appellants, that of Board member Stan Jordan, was also supportive of the policy. See id. at 8 ("I plan to vote for the administration plan and against the proposal that's on the table."). Taken as a whole these utterances by School Board members constitute recognition that the old regime of state directed school prayer in Duval County had passed and been replaced by a new regime over which they had far less control.

schools), which contained some expressions of religious motives by several legislators who voted for the Act, could not "override the express statutory language articulating a clear secular purpose."[9] Id. Here, we have even far less evidence of a sectarian policy purpose on the part of the School Board or their principals.

In sum, whether standing alone or in concert, the three pieces of evidence cited by Appellants cannot strip the policy of a secular purpose. No matter what an individual board member may have hoped--and they said nothing on the record about codifying this policy--Duval County's policy is facially neutral and undeniably evinces a secular purpose. That is enough to pass constitutional muster under the first prong of Lemon.

B.

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[9]Appellants cite Jager v. Douglas County Sch. Dist., 862 F.2d 824 (11th Cir. 1989), for the proposition that a policy, whose actual purpose is to promote prayer or is "intrinsically religious," Id. at 830, cannot meet the secular purpose prong of Lemon. But Jager does no more than state the obvious, that in order to meet Lemon first prong, a government policy must have a genuine secular purpose and not be a sham. See Edwards, 482 U.S. at 586-87, 107 S.Ct. 2573. If a policy's "actual purpose" is wholly religious then Lemon's secular purpose requirement is not satisfied. In Jager we held that a school district's practice of having representatives of student organizations deliver invocations prior to football games had as its "preeminent purpose" the endorsement of Protestant Christianity. Id. ,862 F.2d at 830. The only discretion left to the students was the selection of who would pray.

As for whether the policy has the primary effect of advancing religion, we conclude that because the policy, on its face, allows a student message on any topic of the student's choice it satisfies the second prong of Lemon. The Duval County School Board policy is content-neutral and does not mandate or even encourage that a graduation prayer will be uttered. As the district court found, the implementation of the policy may result in no graduation prayer at all. See Adler I, 851 F.Supp. at 454. While it is undoubtably true that an autonomous student speaker could read a prayer at graduation under the policy, it is equally true that the same speaker may opt for a wholly secular message instead. It would require a strain of the term "primary" to suggest that a content-neutral forum policy, which accommodates private sectarian and secular speech on an equal basis, has the "primary" or "principal" effect of advancing religion.

Moreover, we believe that a student's private choice to deliver a religious message at graduation is a religious effect attributable to the student father than to the facial terms of the Duval County policy. As the Supreme Court has explained, "to have forbidden 'effects' under Lemon, it must be fair to say that the government itself has advanced religion through its own activities and influence." Corporation of Presiding Bishop of Church of Jesus Christ Latter-Day Saints v. Amos, 483 U.S. 327, 337, 107 S.Ct. 2862, 97 L.Ed.2d 273(1987). Here, the policy strips the School Board of any authority over the central decisions– who speaks, whether there will be a speaker, and what the

content of the speech may be. Indeed, in order to ensure that no one perceives any student's religious utterance as being the state's prayer, the policy explicitly divorces any student message from School Board sponsorship by specifically stating that any message will be "prepared by the student volunteer and shall not be monitored or otherwise reviewed" by the School Board or its employees. This language acts as an overt disclaimer, further distancing the state from the student message.

Our conclusion is amply supported by Supreme Court caselaw. The Court,, under Lemon,, repeatedly has upheld facially neutral programs that permit individuals to support religion through their own private choices. See, e.g., Agostini, 521 U.S. at 223-232, 117 S.Ct. 1997 (upholding New York program of sending public school teachers into parochial schools to provide remedial education where aid was made available to religious and secular beneficiaries on a nondiscriminatory basis); Zobrest, 509 U.S. at 8-12, 113 S.Ct. 2462 (sustaining section of Individual with Disabilities Act providing disabled children with aid regardless of whether a child attends a sectarian institution); Witters, 474 U.S. at 488, 106 S.Ct. 748 (holding that Establishment Clause was not violated when the state paid a blind student's tuition at a Christian college through a generally-applicable aid program because any public aid that reached religious institutions under the program was "a result of the genuinely independent and private choices of aid recipients"); Mueller v. Allen, 463 U.S. at 399, 103 S.Ct. 3062 (upholding a state tax deduction for specified educational

expenses, and characterizing any such aid to religion as being "only as a result of numerous, private choices of individual parents of school-age children"). The Duval County policy allows elected student speakers the freedom to privately choose a graduation message of an either secular, sectarian, or mixed nature. We therefore find that the Duval County policy does not have a primary effect of advancing religion.

C.

For many of the same reasons, we conclude that the School Board's policy does not excessively entangle the Board with religion in violation of the third part of the Lemon test.[10] The policy remains facially neutral with respect to religion, requiring only that graduation messages be voted on by students, and composed and directed by a student speaker. By its very terms, the policy explicitly prohibits any review of the student message at all. Undoubtedly, the School Board would find itself far more entangled with religion if it attempted to eradicate all religious content from student messages than if it maintained a meaningful policy of studied neutrality. See Mergens 496 U.S. at 253, 110 S.Ct. 2356 (stating that "a denial of equal access to religious speech might well create

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[10]Recently, in Agostini, the Court merged the second and third Lemon prongs because "the factors we use to assess whether an entanglement is 'excessive' are similar to the fact we use to examine 'effect.'" Id., 521 U.S. at 232.

greater entanglement problems in the form of invasive monitoring to prevent religious speech at meetings at which such speech might occur"); Widmar, 454 U.S. at 272 n. 11, 102 S.Ct. 269 (noting that schools who adopt open-forum policies for private secular and religious groups equally "would risk greater 'entanglement' by attempting to enforce its exclusion of 'religious worship' and 'religious speech'"); Chabad-Lubāvitch, 5 F.3d at 1389; Jager, 862 F.2d at 831.

Implicit in Appellants' rationale is the need for school censorship if schools are to allow students the opportunity to speak at graduation at all. At the core of Appellants' position is the claim that the state's control over nearly all aspects of the graduation ceremony automatically imputes all private speech to the state. But the degree of control that schools generally exert over high school graduation ceremonies is unlikely to diminish because graduation ceremonies are, by their nature, highly choreographed. Appellants' position therefore would leave school officials with only two choices: either eliminate student speech altogether or retain student speech, subject to censorship by school authorities. If school officials choose the latter course, they will be left with the unenviable task of identifying the religious content in student speeches for excision prior to graduation or of interrupting renegade graduation speakers who resort to sectarian speech.[11] If,

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[11]There is no easy or precise guideline for school officials to follow when excising student speech of religious content. The constitutional definition of religion is expansive; it encompasses "all sincere religious

however, they choose the former, they will have deprived the graduation class of any role in shaping its high school graduation and they will have banned all private student expression. The Establishment Clause requires no such Hobson's choice. What it does require is a recognition of the critical difference between a private statement of religious values and a religious utterance endorsed by the state. The Duval County School Board's policy, on its face, does no more than recognize this distinction.

III.

Based on the foregoing, we hold that the Duval County school system's policy of permitting graduating students to decide through a vote whether to have an unrestricted student graduation message at the beginning and/or closing of graduation ceremonies does not facially violate the Establishment Clause. We therefore affirm the judgment of the district court.

AFFIRMED.

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beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent" and "which occupies in the life of its possessor a place parallel to that filled by [] God." United States v. Seeger, 380 U.S. 163, 176, 85 S.Ct 850, 3 L.Ed.2d 733 (1965). Moreover, the beliefs "need not be acceptable, logical, consistent, or comprehensible to others." Thomas v. Review Bd., 450 U.S. 707, 714, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981). Moreover, if the School Board's censorship was not "rigorous" enough to prevent religion from creeping into graduation ceremonies, a policy of allowing even monitored student speech still would be subject to constitutional attack.

KRAVITCH, Senior Circuit Judge, *dissenting*, in which BARKETT, Circuit Judge, joins:

I agree with the majority that the Supreme Court's decisions in Lee v. Weisman, 505 U.S. 577, 112 S. Ct. 2649 (1992), and Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S. Ct. 2105, 2111 (1971), control this case. I disagree, however, with the majority's application of those decisions to the facts of this case. The majority articulately defends the constitutionality of the Duval County graduation policy, but the analysis is flawed by an unwillingness to look beyond the policy's terms. A broader, more contextual appraisal leads me to conclude that the Duval County policy violates the Establishment Clause of the First Amendment. Therefore, I respectfully dissent.

In Lee, 505 U.S. at 586, 112 S. Ct. at 2655, the Supreme Court held a graduation ceremony unconstitutional because (1) school officials were overly involved with the delivery of a prayer, and (2) audience members were in effect required to participate in a formal religious exercise. Admittedly, the link between the Duval County policy and resulting prayer at graduation ceremonies is not as direct as in Lee. But although the Duval County school administration may have *distanced* itself from prayer offered during graduation ceremonies, it did not *disconnect* itself from religious expression. Nor does the policy mitigate the influences that coerce audience members to participate in prayers offered at graduation.

Although Lee presents a specific example of an Establishment Clause violation, Lemon, 403 U.S. at 612-13, 91 S. Ct. at 2111, still provides the general Establishment Clause test. The Duval County policy runs afoul of the Lemon test because its only credible purpose is to maximize the chance that prayer will continue to play a prominent role in Duval County graduations. Furthermore, the policy's "primary effect" is to advance religion. The policy communicates an endorsement of religion both because it leads to more religious expression in the opening and closing messages than all other types of speech, and because its purpose is apparent to any reasonable observer aware of its terms, the graduation traditions in Duval County, and the events leading to the policy's creation.

Invoking the ideals of free student expression and referencing the public forum doctrine do not cleanse the Duval County policy of its constitutional defects. Allowing a student majority to do what the school administration could not offends our constitutional scheme of individual rights. Nor does the policy promote free expression or render the graduation ceremony equally available for any sort of speech-not when it allows for only one speaker, and a speaker chosen by majority vote at that.

In addition to disagreeing with the majority's facial analysis of the Duval County policy, I take issue with the conclusion that the plaintiffs waived their as-applied claims. After analyzing the Duval County policy under both Lee and Lemon, and critiquing the majority's public forum

analogy, this dissent concludes with a brief examination of the procedural posture of the case and the district court's order advancing the trial on the merits.

A. Lee v. Weisman

The starting point for the analysis of the Duval County policy is Lee v. Weisman, 505 U.S. 577, 112 S. Ct. 2649 (1992), because it is the only Supreme Court case invo ing prayer at public school graduation ceremonies. In Lee, a principal invited a rabbi to give a prayer at the school's graduation ceremony and provided a pamphlet suggesting an appropriate tone and possible content for the presentation. Id. at 581, 112 S. Ct at 2652. The Supreme Court found it unnecessary to apply the Lemon analysis in Lee because two "dominant facts rendered the rabbi's prayer so clearly unconstitutional. Id. at 586, 112 S. Ct at 2655. First, "[t]he government involvement with religious activity [was] pervasive, to the point of creating a state-sponsored and religious exercise in a public school." Id. at 587, 112 S. Ct at 2655. Second, "the State, in a school setting, in effect required participation in a religious exercise." Id. at 594, 112 S. Ct. at 2659. The majority purports to evaluate Duval County's policy in light of the standards enunciated in Lee but it both understates the degree of state direction relevant for the first prong of the Lee analysis and effectively writes Lee's second "dominant fact," coerced participation, out of the opinion by conflating it with the state's control over the religious exercise itself.

1. State Control

In Lee, state actors made the decision to include an invocation and benediction in the graduation ceremony, selected the speaker, and suggested an appropriate tone for the message. Id. at 587-88, 112 S. Ct. at 2655-56. These elements of state involvement are of constitutional import because they "made it clear that the graduation prayers bore the imprint of the State." Id. at 590, 112 S. Ct at 2657. Admittedly, the Duval County policy is not as egregious as the practice scrutinized in Lee. The state involvement with prayers offered through the operation of the policy, however, is still too extensive to comport with the Establishment Clause.

In its own search for state involvement the majority focuses on the student standing alone at the podium delivering an uncensored message, but ignores how she got there. A broader inquiry reveals that the state directs the exercise of prayer at Duval County high school graduations because: (1) the programmatic constraints imposed by the graduation policy promote religious expression, especially given the context surrounding the policy's promulgation, (2) the election of a student to deliver the opening or closing "message" is state action, and (3) the vote for student speaker is based on the expected content of the candidate's message.

According to the majority, "[t]he School Board ... does not suggest in any way ... that the graduating class consider

religious or any other criteria in deciding whether to have a student message or in selecting a particular student speaker." The policy does not permit the school administration to remain passive, however, and the policy's terms do encourage the senior class to consider religious criteria in planning the opening and closing.

Under the terms of the policy, it is the high school administration that organizes elections for the graduation program. The policy only allows for student input concerning the beginning and end of the ceremony--portions of the program appropriate for a limited range of speech. The policy also dictates that the opening and closing messages last no more than two minutes, further limiting the types of speech possible. The constraints of the policy itself provide clues about the type of message the school administration had in mind. In case students need more of a hint, however, history provides one. Until the year the policy went into effect, Duval County high school graduations had opened and closed with a prayer. As the district court noted, "[i]nvocations and benedictions have been traditional and are therefore familiar if not expected at high school graduation ceremonies" in Duval County. Adler v. Duval County Sch. Bd., 851 F. Supp. 446, 453 n.9 (M.D. Fla. 1994).

Moreover, the senior class vote is itself attributable to the state. The majority concludes otherwise because it views the students as making all of the "central" decisions regarding the opening and closing message. This logic

undervalues the power of the policy's terms to influence the students' choices; it also treats the graduation "message" as if it were an independent event, rather than the opening and closing segment of a more substantial occasion, the graduation ceremony. This narrow perspective permits the majority to ignore the fact that the Duval County policy gives students control over only a tiny fraction of the graduation ceremony as a whole.[1]

The actions of a private party can be attributed to the state if they are taken in exercise of a right or privilege rooted in state authority, and if the private party can "in all fairness" be described as a state actor. See Edmonson v.

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[1]Both the Ninth and the Third Circuits have recognized that student decisions concerning particular aspects of their graduation ceremonies are attributable to the state. See ACLU of N.J. v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471 (3d Cir. 1996); Harris v. Joint Sch. Dist. No. 241, 41 F.3d 447 (9th Cir. 1994), vacated with directions to dismiss as moot, 515 U.S. 1154, 115 S.Ct 2604 (1995). These courts both focused on the graduation ceremony as a whole. They noted that the school administration is ultimately responsible for the graduation ceremonies, and that "the seniors have authority to make decisions regarding graduation only because the school allows them to have it." Harris, 41 F.3d at 454; see also, Black Horse Pike, 81 F.3d at 1479. They also acknowledged the school's extensive involvement with other details of the graduation ceremony. See Black Horse Pike., 81 F.3d at 1479; Harris, 41 F.3d at 454. Only the Fifth Circuit has held that a student vote regarding prayer cannot be attributed to the state, see Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963, 970-71 (5th Cir.), vacated, 505 US. 1215, 112 S. Ct. 3020 (1992), but that holding is in tension with the more recent case of Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806 (5th Cir. 1999), cert. granted in part 120 S. Ct. 494.(Nov. 15, 1999). In Santa Fe, the Fifth Circuit held that allowing proselytizing prayers at graduation violated the First Amendment, even though the senior class selected the speaker. 168 F.3d at 817.

Leesville Concrete Co., 500 U. S. 614, 620, 111 S. Ct. 2077, 2082-83 (1991). Clearly, the student vote satisfies the first part of this analysis: but for the policy, the student vote would not occur. Before the policy went into effect, students may have had input, but ultimately the school administration decided whether to have a formal opening and closing segment of the graduation ceremony, and if so, what to include in those portions of the program.

Whether a private party can "in all fairness" be described as a state actor depends on whether the party's actions are "governmental in character." See, id. at 621, 111 S. Ct. at 2083. Relevant to this analysis are: "the extent to which the actor relies on governmental assistance and benefits; whether the actor is performing a traditional governmental function; and whether the injury caused is aggravated in a unique way by the incidents of governmental authority." Id. at 621-22, 111 S. Ct. at 2083 (citations omitted). Considered in light of these three factors, the student decisions made pursuant to the Duval County policy are "governmental in character."

First, the students vote not merely with the cooperation of the school authorities but at the behest of school district policy. They do so on school property, and the assistance or cooperation of the principal and faculty with administering the election must be presumed. Furthermore, students vote about a message that will be delivered at an event sponsored and controlled by the school.

Second, planning public school graduation ceremonies is a traditional governmental function. The Supreme Court noted in Lee that "teachers and principals must and do retain a high degree of control over the precise contents of the program, the speeches, the timing, the movements, the dress, and the decorum of the students." 505 U.S. at 591, 112 S. Ct. at 2660. Before the policy went into effect, the Duval County school administration had the power to plan every aspect of the graduation ceremonies, including the opening and closing, and the policy does not divest the administration of control over the graduation ceremonies generally.

Finally, prayers recited during the-opening and closing portions of the ceremony have an injurious effect precisely because of the state association with the event. Most people properly perceive their everyday encounters with others' religious expression as an incidental requirement of life in a diverse society, rather than as a burden or attack on their own beliefs. See Lee, 305 U.S. at 628, 112 S. Ct. at 2677 (Souter, Stevens, & O'Connor, JJ., concurring). It is *government* participation in religious expression that offends the First Amendment because of its power to influence the inherently personal nature of religious faith, potentially coercing religious minorities or even coopting mainstream sects. See id. at 591-92, 112 S. Ct. 2657-58; see also id. at 608-09, 112 S. Ct. at 2666 (Blackmun, Stevens, & O'Connor, JJ., concurring).

The student vote satisfies the criteria for state action described in Edmonson. and other cases have identified state action in a similar context. These cases stand for the proposition that when government delegates authority over a portion of a public operation to an ostensibly private actor, but retains ultimate control over the larger operation, the exercise of the delegated authority is attributable to the state. Administering elections, for example, is a state function. Although states can give political parties and private associations a role in choosing candidates to appear on the ballot, the private entities' fulfillment of that role is state action. See Terry v. Adams, 345 U.S. 461, 469, 73 S. Ct. 809, 813 (1953); Smith v. Allwright, 321 U.S. 649, 663, 64 S. Ct. 757, 765 (1944). The state cannot escape its responsibility to maintain an electoral system that comports with the Constitution by allowing non-governmental entities to control part of the electoral system. See Terry, 345 U.S. at 469, 73 S. Ct. at 813.

These rules do not only apply to fundamental governmental operations such as elections. For example, after a city has managed a park for a period of time, it cannot continue to maintain the facilities but avoid the Fourteenth Amendment's mandate to integrate by appointing private trustees to oversee the park. See Evans v. Newton, 382 U. S. 296, 301, 86 S. Ct. 486, 489 (1966). The park in Evans had acquired "momentum" as a public facility, and the city remained "entwined" in its operation. It was of no consequence that the trustees with official authority were not public employees, because "when private

individuals or groups are endowed by the state with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations."[2] Id. at 299, 86 S. Ct. at 488.

So it is with Duval County's public high school graduation ceremonies, which have always been state-sponsored events. Through the graduation policy, the school administration delegates one decision to the senior class, but in all other ways "remains entwined in the management [and] control" of the graduation ceremonies. Id. at 301, 86 S. Ct. at 489.

The fact that the policy requires the senior class to exercise its decisionmaking authority through a majoritarian vote does not change the analysis. "One's ... fundamental rights may not be submitted to vote; they depend on the outcome of no elections." West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638, 63 S. Ct. 1178, 1185-86 (1943). After all, "[t]he very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political

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[2]Indeed, even if all maintenance and title to the land were in private hands, the park's management would have to comply with the Constitution because "the predominant character and purpose of [the] park are municipal." Evans, 382 U.S. at 302, 86 S. Ct at 490.

controversy, to place them beyond the reach of majorities."[3] Id., 63. S. Ct. at 1185.

To further distance the state from the actual content of the opening and closing messages, the majority emphasizes that the senior class votes for a speaker, not a particular speech. The majority concludes that the selection of the student speaker is made in a content-neutral manner. It requires a logical leap, however, to move from the student speaker's limited autonomy to craft the graduation message to the conclusion that the senior class chooses the speaker without considering what she is going to say.

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[3]Under the majority's reasoning, student councils could, without prompting, vote to decorate each classroom with the Ten Commandments or to have a student volunteer begin each school day by reading a prayer over the public address system. In one sense the policy at issue in this case poses more of a constitutional problem than these examples. The student council's decisions would at least be genuinely student-initiated, but here the opportunity for an opening and closing message is created by the school administration and the vote is organized and influenced by school officials. Local government could undermine minority and individual rights in a similar fashion. In County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 109 S. Ct. 3086 (1989), the Supreme Court held that permitting the display of a creche in the Grand Staircase of a county courthouse violated the First Amendment. The majority's view here suggests that a town council in a religiously observant and overwhelmingly Christian community could bypass the holding in Allegheny by sponsoring an election each year for volunteer committees to decorate town hall in mid-December or in the weeks following the secular holiday of Mardi Gras. Such a procedure, however, would not alter the city's control over town hall or eliminate the symbolic connection between the religious decorations and the town government.

It is more realistic to acknowledge that students vote based on the anticipated content of the candidates' graduation message. Unlike typical elected offices with numerous responsibilities or strictly honorary positions such as the homecoming queen mentioned in the majority opinion, the graduation speaker is elected to carry out one very specific task: she must deliver a single speech that lasts less than two minutes. If the school board does not expect students to vote based on how they anticipate the candidates will perform that one responsibility, then why have an election at all?[4]

Factoring the content of the speech into the choice of speaker is problematic because the choice is attributable to the state and because the terms of the policy influence the choice as well. Furthermore, given the pervasive state involvement in public school graduation, abstaining from censorship is not enough to sever the state's association with speech made at the ceremony. To effectively disconnect itself from that speech, the state must be able to articulate secular, neutral criteria for selecting the speaker that are not related to the content of the speech.

This is the rule suggested by the Ninth Circuit's decision in Doe v. Madison Sch. Dist. No. 321, 147 F.3d 832

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[4]Certainly some students will vote based on criteria such as the popularity of the candidates. We cannot assume, however, that this will be the norm. It is worth noting that the Duval County policy imposes no limits on campaigning.

(9th Cir. 1998), vacated as moot, 177 F.3d 789 (9th Cir. 1999) (en banc). The majority finds the Duval County policy similar to the policy in Doe, but it is the differences that are instructive. Under the policy at issue in Doe, a minimum of four student speakers were selected strictly on the basis of their academic standing to deliver any sort of address they wanted.[5] See id. at 835. There was no opportunity to influence the types of speeches given, because there was no discretion in choosing the speakers. The authorities could also disconnect themselves from the content of the student speakers' speech because the speakers were chosen not for the views their peers or teachers hoped they would espouse, but on the basis of a non-content based objective criterion (class standing) related to the graduation ceremony's purpose of celebrating student achievement.

Although the Duval County policy does not mandate that a prayer be offered at every graduation, it nonetheless keeps the state heavily involved in the choices regarding the ceremonies' opening and closing. The policy not only allows, but in some ways encourages, the choice of prayer. Although subtler and more indirect than the practice at

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[5]The policy in Doe did not limit the duration of the students' speech nor restrict it to a segment of the graduation program uniquely appropriate for, and traditionally devoted to, prayer. See id. at 834. Unlike the Duval County policy, nothing about the policy in Doe encouraged the student speakers to choose to deliver a prayer. If anything, requiring a minimum of four speakers minimizes the risk that the school administration promotes any particular type of message through the policy.

issue in Lee, the Duval County policy contains the same elements of state involvement with religious expression.

2. Coerced Participation in a Religious Exercise

The second dominant fact in Lee was that the state in effect compelled the graduating students' participation in a religious exercise. See 505 U.S. at 586, 112 S. Ct. at 2655. Coerced participation in a religious exercise is a separate and distinct issue from that of who controls the religious exercise. According to the Supreme Court, this coerced participation in prayer represents the injury suffered by dissenting students. See Lee 505 U.S. at 594, 112 S. Ct. at 2659.

Writing about this second dominant fact, the Lee Court stated: "The sole question presented is whether a religious exercise may be conducted at a graduation ceremony where, as we have found, young graduates who object are induced to conform." Id. at 599, 112 S. Ct. at 2661. The majority here refuses to address that question. Instead, it holds that whether the school administration coerces student participation in a religious exercise "is largely determined by the measure of state control over the message at a graduation ceremony, rather than state control over the ceremony itself." The majority cites no authority for this interpretation, which essentially reads the "second

dominant fact" out of Lee and disregards much of that decision's analysis.[6]

The majority's interpretation also ignores the relationship between the Free Exercise and Establishment Clauses of the First Amendment. "The Free Exercise Clause embraces a freedom of conscience and worship," and the Establishment Clause is "[t]he method for protecting [that] freedom of worship and freedom of conscience in religious matters." Id. at 591, 112 S. Ct. at 2657. When the government requires an individual to participate in a religious exercise, it impinges that individual's freedom of conscience and worship, even if the government is not conducting the religious service itself.

Three factors contributed to the coercion of student participation in prayer in Lee. First, attendance for seniors is in effect mandatory because graduation is a significant right of passage in our society. See id. at 595, 112 S. Ct. at

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[6]The Supreme Court did not state in Lee whether either one of the "dominant facts" would constitute a violation of the Establishment Clause by itself, or whether the government needs to both direct a religious exercise and coerce participation in that religious practice. By deciding that coerced participation only exists if the government controls the religious exercise, the majority in this case answers the question, but in quick fashion. We need not address the relationship between the two dominant facts, because we conclude that both are present in the Duval County policy. It is worth reiterating, however, that the Supreme Court identified the injury to the student plaintiffs as the mandatory participation in a religious exercise, without making reference to who conducted or controlled it See Lee, 505 U.S. at 594, 112 S. Ct. at 2659.

2659. Second, "[a]t a high school graduation, teachers and principals must and do retain a high degree of control over the precise contents of the program, the speeches, the timing, the movements, the dress, and the decorum of the students." Id. at 597, 112 S.Ct. at 2660. Finally, adolescents are susceptible to peer pressure, and the pressure to conform "is strongest in matters of social convention." Id. at 593, 112 S.Ct. at 2659.

These coercive elements are as present at Duval County graduation ceremonies under the policy at issue in this case as they were at the Providence, Rhode Island, graduation scrutinized in Lee. Graduation is a central life event for teenagers in north Florida. School authorities set the dress code and prescribe appropriate behavior for seniors. Often, students are required to remain silent or even stand for the ceremonies' opening and closing messages. The Duval County policy exacerbates peer pressure, because would-be dissenters know that the majority of their classmates chose the student speaker. Finally, the policy heightens the social pressure to participate by allowing religious expression at a formal, ceremonial stage of the graduation. The audience remains seated and passive through much of the graduation, including speeches by the valedictorian and invited dignitaries, but the opening and closing call for participation of some sort.[7] According to Lee, even an

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[7]Duval County graduations bear out this observation. School officials typically ask the audience to stand for the first few segments of the ceremony, including the "Invocation" or "Inspiration" and there often is a

understated gesture such as standing or remaining respectfully silent is a constitutionally significant degree of participation. See id. at 593, 112 S. Ct. at 2658. Students cannot be expected to express dissent in this environment, with the obligation of polite participation and the school authorities' control over student decorum.

B. The Lemon Test

Lee is an obvious point of departure for evaluating the Graduation Policy because it is the most factually similar Supreme Court case, but it did not establish a new test for the Establishment Clause, and the Supreme Court did not state that the facts of Lee represent the boundary between what is and what is not constitutional. Lemon still provides the framework for evaluating a statute or policy's compliance with the Establishment Clause; it is the heart of the analysis.

Lemon requires that: (1) the Duval County school system have a secular purpose for adopting the policy; (2) the policy's primary effect neither advances nor inhibits religion; and (3) the policy does not result in excessive Government entanglement with religion. See Lemon v.

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song calling for more substantial participation. The audience then sits for the main body of the ceremony, which includes speeches and the presentation of diplomas. See R2 (Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction, Exs. 4-7, 8-19, 22, 25-28, 32-33, 37-40, 42-45).

Kurtzman, 403 U.S. 602, 612-13, 91 S. Ct 2105, 2111 (1971). The Duval County policy would violate the Establishment Clause if it fails to meet even one of these criteria, see Edwards v. Aguillard, 482 U.S. 578, 585, 107 S. Ct. 2573, 2577 (1987), but it falls short on two grounds: the policy has no genuine secular purpose, and its primary effect is to advance religion.

1. The Purpose of the Duval County Policy is Pre-Eminently Religious

Applying the first prong of the Lemon test, we determine whether the challenged policy has a "clearly secular purpose" or "whether [the] government's actual purpose is to endorse or disapprove of religion." Wallace v. Jaffree, 472 U.S. 38, 56,1 05 S.Ct. 2479, 2489 (1985). We must be deferential to the government's articulation of the purpose behind a policy, and that policy need not be exclusively or even predominantly secular. See Edwards, 482 U.S. at 586-87, 107 S. Ct. at 2579; Wallace, 472 U.S. at 56, 105 S. Ct. at 2489. We must not, however, shirk our responsibility of judicial review. If a policy's "pre-eminent purpose" is religious, or if the proffered secular justifications for the policy are insincere, then the policy violates the Establishment Clause. See Edwards, 482 U.S. at 586-87, 107 S. Ct. at 2579; Lynch v. Donnelly, 465 US. 668, 690-91, 104 S. Ct. 1355, 1368-69 (1984) (O'Connor, J., concurring); Stone v. Graham, 449 U.S. 39, 41, I01 S. Ct 192, 193-94 (1980); Church of Scientology Flag Serv. Org. v. City of Clearwater, 2 F.3d 1514, 1527 (11th Cir. 1993). This is the

case with the Duval County policy. The dominant reason for its passage was to keep prayer in graduation ceremonies; the secular justifications embraced by the majority are at best incidental effects of the policy.

The context surrounding the creation of the policy, the policy's terms, and the policy's title all suggest its predominantly religious purpose. The chronology of events leading up to the graduation policy is particularly telling. Until 1992 Duval County consistently opened and closed its schools' graduation ceremonies with prayer. Responding to the Lee decision in 1992, the school administration directed that future graduations could not include prayer. The administration then came under pressure from students and the community to find a way to retain prayer in the ceremonies. Before the next school year's graduation ceremonies, the administration created a new policy. That policy delegated decisions about the graduation ceremonies' opening and closing to students while lifting the restriction on religious expression. Finding a predominantly religious purpose behind the new policy in this context requires no speculation but only common sense.

Aspects of the new policy itself betray the purpose of maximizing the chance that prayer would be included in future graduation ceremonies without directly mimicking the school officials' actions proscribed by Lee. The policy only involves the opening and closing segments of the graduation ceremonies-the portions of the program historically dedicated to prayer. The policy also carefully

restricts opening and closing messages to two minutes, a short period amenable to a limited range of speech that includes prayer. Finally, the policy dictates that decisions about the two minute opening and closing be made by majoritarian vote, limiting the opportunity for innovation and variety.

Finally, there is the title of the memorandum announcing the new policy: Graduation Prayer. The attorney who drafted the memorandum obviously understood the reason for the policy, but the majority of this court chooses to ignore the evidence. Instead, it relies on the maxim that it is improper to use a statute's title to inform the plain meaning of the statute's language. In all the cases cited by the majority, however, the courts had to interpret the meaning of statutes in order to apply them correctly.[8] In this case, on the other hand, the question is why the school administration created the policy.

Moreover, "Graduation Prayer" is not simply the name of a bill or a title chosen during the codification process: it is title of the memorandum announcing and explaining the new policy to the principals who would have to administer it. The Graduation Prayer memorandum was written at the

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[8]See Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R. Co., 331 U.S. 519, 525-26, 67 S. Ct. 1387, 1390-91 (1947); North Ala. Express, Inc. v. Interstate Commerce Comm'n, 971 F.2d 661, 663-64 (11th Cir. 1992); Scarborough v. Office of Personnel Management, 723 F.2d 801, 811-16 (11th Cir. 1984); Rich v. Commissioner of Internal Revenue Serv., 250 F.2d 170, 173-75 (5th Cir. 1957).

behest of the school Superintendent by the attorney who crafted the policy.[9] Certainly the title and text of the memorandum could provide insight into the policy's instrumental goals.

The memorandum begins with two paragraphs devoted to prayers at graduation and the discord following Lee. This analysis concludes with an explanation of the "key to the Lee v. Wiseman [sic] decision,"' and then, "[w]ith that premise in mind," segues into the provisions of the new policy. The policy's operational terms carefully avoid mention of prayer, but the memorandum as a whole makes clear that the choice of a title was far from incongruous.

The majority makes much of the "plain" and "facially neutral" language of the policy itself. Adopting the terminology "opening or closing message" in the wake of Lee, however, appears as subterfuge, a "sham," see Edwards, 482 U.S. at 587, 107 S. Ct. at 2579, given the tradition of beginning and ending graduation with prayer. In the words of Shakespeare: "What's in a name? That which we call a rose / By any other name would smell as sweet."[10]

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[9]In sharp contrast, numerous legislators influence the choice of statutory language, and titles are often chosen for political effect rather than to accurately summarize a bill's purpose or content.

[10]William Shakespeare, Romeo and Juliet, act 2, sc. 2.

Unconvinced, the majority suggests three possible secular purposes for the policy: First, that the policy "afford[s] graduating students an opportunity to direct their own graduation ceremony;" second, that it permits free expression; and finally that the policy "allows students to solemnize graduation." None of these possibilities withstands close scrutiny.

It is hard to accept that the Duval County school administration crafted the policy to empower students, both because the policy does so in such a constrained manner and because there is scant evidence that the administration was interested in promoting student leadership or autonomy as ends in themselves. The policy does conclude with the statement, "[t]he purpose of these guidelines is to allow students to direct their own graduation message without monitoring or review by school officials," but the majority places more significance on the statement than it can bear.[11] The statement expresses the "purpose" of the policy in terms of what it does, rather than why it was created. And as mentioned above, the memorandum begins

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[11]The Supreme Court looked beyond a similarly "self-serving" statement of purpose in a Kentucky statute in Stone, 449 U.S. at 41, 101 S. Ct at 193-94. The statute required that the Ten Commandments be posted in each classroom and noted the "'secular application of the Ten Commandments'" in their "'adoption as the fundamental legal code of Western Civilization and the Common Law of the United States.'" Id. at 41, 101 S. Ct. at 193 (quoting Ky. Rev. Stat. Ann. § 158.178 (Banks Baldwin 1980). Despite the elucidation of a legitimate educational rationale in the statute, the Court held that "[t]he pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature." Id. at 41, 101 S.Ct. at 194.

with two paragraphs about school prayer and instructs the reader to consider the terms of the policy with that discussion in mind. The sentence about student direction, without any accompanying elaboration, appears "tacked on" to the end of the memorandum.

This secular purpose inserted in the text might still be credible if there were any other indication that the administration had been considering the benefits of expanded student speech and self-governance before the intense interest in graduation prayer arose following Lee. Although the record is replete with evidence that students and community members pressed school officials to retain prayer in the graduation ceremonies, however, there is no evidence that officials were promoting, or that students were demanding, a larger role planning the graduation program and more student speech generally.[12]

Finally, the Duval County policy enhances student control over the graduation ceremony in only the most limited sense. The senior class cannot choose to have a group deliver a message, and it cannot select a non-student speaker. The speaker's options are limited, because the

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[12]I do not mean to suggest that the school administration was hostile to student involvement in planning graduation ceremonies. Historically the student role in planning graduation varied from school to school. Student leadership was quite strong at some schools, but school officials always had ultimate authority over the graduation programs. There simply is no evidence that interest in, or pressure for, student autonomy was on the rise in 1992 and 1993.

policy restricts the message to two minutes at the beginning or end of the ceremony. Interestingly, the policy does not ensure that other student presentations during the graduation will be uncensored. In fact, principals often review valedictory speeches in Duval County.[13] Although the school administration can promote student expression incrementally, the graduation policy's stringent constraints and the choice to relinquish to students only the planning for the opening and closing suggest that student autonomy and free expression were not the policy's true purposes.

The majority also suggests that solemnizing graduation ceremonies may have been the purpose behind the Duval County policy, but the policy actually reduces the potential for solemnization. Until the policy went into effect, an opening and closing prayer at every graduation ceremony served a solemnizing function. Now, however, the opening and closing are optional, and for each graduation, students have to choose anew whether to even have a message. Moreover, the majority is quick to emphasize that the policy leaves the content of the opening and closing messages, should the senior class decide to have them, unfettered. If the choice of messages is as wide-ranging as the majority would have us believe, however, many of the possibilities

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[13] See R 1st Supp. Exs. (Reynolds Dep. at 21; Epting Dep. at 26-27; Lockett Dep. at 11).

would serve no solemnizing function.[14] With its new policy, Duval County moved from having a solemnizing opening and closing message at every graduation ceremony to the possibility of having, if not a prayer, either no message or a message that undermines the solemnity of the occasion.

Moreover, solemnization is not a valid purpose for a policy purportedly giving students unfettered control over the content of a speech. As already noted, prayer is one of a limited subset of messages with a solemnizing effect. To the extent the school administration wanted and expected students to opt for solemnizing messages, it is likely the

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[14]Uninfluenced by the terms of the policy or the expectations of their teachers and colleagues, student speakers could take the opportunity to criticize the principal, teachers, or cliquish classmates. Even an innocent but unfocused or poorly delivered speech would not solemnize the event. A proselytizing prayer would prove divisive rather than solemnizing as well. See Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806, 816 (5th Cir. 1999), cert. granted in part, 120 S. Ct 494 (Nov. 15, 1999) ("[W]e cannot fathom how permitting students to deliver sectarian and proselytizing prayers can possibly be interpreted as furthering a solemnizing effect"). The majority cites three cases for the proposition that prayer can serve a legitimate solemnizing function, but all three recognized that they were considering only nonsectarian, nonproselytizing speech. See Chaudhuri v. Tennessee, 130 F.3d 232, 236-37 (6th Cir. 1997) cert. denied 523 U.S. 1024,118 S. Ct. 1308 (1998); Tanford v. Brand, 104 F.3d 982, 983, 986 (7th Cir. 1997); Jones, 977 F.2d at 964-66. The majority also cites Justice O'Connor's concurrence in Lynch for the more general proposition that religious expression can solemnize public occasions, but Justice O'Connor's statement is qualified. "[G]overnment acknowledgments of religion," she writes, can "serve ... the legitimate secular purposes [] of solemnizing public occasions," but her examples are all practices that "are not understood as conveying government approval of particular religious beliefs." Lynch, 465 U.S. at 693, 104 S. Ct. at 1369-70.

administration had prayer in mind. This is an illegitimate purpose under Lemon; public officials cannot encourage prayer, because even if prayer has secondary secular benefits, the promotion of prayer is first and foremost the promotion of religion. See ACLU of N.J. v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471, 1485 (3d Cir. 1996); Harris v. Joint Sch. Dist. No. 241, 41 F.3d 447, 458 (9th Cir. 1994), vacated with directions to dismiss as moot, 515 U.S. 1154, 115 S. Ct. 2604 (1995); Jager v. Douglas County Sch. Dist., 862 F.2d 824, 829-30 (11th Cir. 1989).

Finally, by the majority's own logic, solemnization should not be considered as a possible purpose for the graduation policy. The majority chides Appellants for looking beyond the text of the Graduation Prayer memorandum, but solemnization appears nowhere in the policy's terms or the memorandum's prefatory paragraphs. Hypothetical justifications for a state law or action are not enough to satisfy the Lemon test; courts must look for the *actual* purpose. See Wallace,, 472 U.S. at 56, 105 S. Ct. at 2489. In this case, that search leads only to the promotion of religion.

2. The Primary Effect of the Duval County Policy is to Advance Religion

A governmental policy fails the second prong of the Lemon analysis if it has the primary effect of endorsing religion. See County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 592-94, 109 S. Ct. 3086,

3100-01 (I989). Endorsement occurs if a reasonable observer would believe the policy conveys a message favoring (or disfavoring) religion. See id. 492 U.S. at 597, 109 S. Ct. at 3103 (Blackmun & Stevens, JJ.); id. at 691-92, 109 S. Ct. at 3121 (O'Connor, Brennan, & Stevens, JJ., concurring); School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 390, 105 S. Ct. 3216, 3226 (1985), amended on other grounds, Agostini v. Felton, 521 U.S. 203, 236, 117 S. Ct 1997, 2016 (1997); Lynch, 465 U.S. at 691-92,104 S. Ct. at 1369 (O'Connor, J., concurring). Such a conclusion is possible either if a policy tangibly benefits a religious cause more than any other, or if the observer would believe that a desire to promote religion led to the policy.

The majority discounts the possibility that a facially neutral policy could have the primary effect of advancing religion. One must look beyond the text of a policy, however, to determine its likely effects. The analysis "requires courts to examine the history, language, and administration of a particular statute to determine whether it operates as an endorsement of religion." Wallace, 472 U.S. at 74, 105 S. Ct. at 2499 (O'Connor, J., concurring in the judgment); see also Allegheny, 492 U.S. at 629, 109 S. Ct. at 3120 (O'Connor, Brennan, & Stevens, JJ., concurring in part and concurring in the judgment). This analysis reveals that both the policy itself, viewed in terms of the events leading up to its creation, and the prayers that result from it convey a message of religious endorsement.

Seen in context, the Duval County policy betrays a preference for religious expression despite the seeming neutrality of its terms. It is worth repeating a few details from the analysis of the policy's purpose. The chronology of events leading to the policy and the public pressure to keep prayer as part of the high school graduation ceremonies may not be conclusive evidence, but they inform the reasonable observer's understanding of the policy's purpose. The title of the policy itself, the bulk of the memorandum announcing it, and the fact that the policy only applies to the portion of the graduation ceremony traditionally reserved for prayer are even more telling. Together, these details have the effect of communicating to the reasonable observer that the Duval County authorities favored the inclusion of prayer in future graduation ceremonies.

The interpretation of the school principals reinforces this conclusion. The principals were the first recipients of the Graduation Prayer memorandum, the policy's first "reasonable observers." The principals were responsible for implementing the new policy; how they did so reveals their understanding of its meaning and purpose. In 1993 many principals allowed direct votes on whether to have a prayer during the graduation ceremony.[15] In other schools, officials directly asked the senior class chaplain to deliver a message

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[15]See R 1st Supp. Exs. (Stone Dep. at 16; Johnson Dep. at 8; Hite Dep. at 18-19).

during graduation.[16] Since 1993 it has been common for the official graduation programs to list the student speaker as Chaplain, and to use the religious terms "invocation" and "benediction" instead of "opening" and "closing message."[17] These programs are printed before the graduation ceremony without the benefit of reviewing the student's speech.

Beyond an observer's conclusions about the school administration's motives lies the policy's tangible result: it leads to more prayer at public events. Before the policy took effect, the Superintendent had responded to Lee by proscribing the traditional opening and closing graduation prayers. The new policy provided a mechanism to reestablish prayer in those portions of the ceremony. In the policy's first year, ten out of seventeen schools opted for some sort of prayer, meaning that it led to more prayer than all other forms of speech combined. And the inherent effect of prayer is to advance the religious beliefs of the speaker.[18]

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[16]See R 1st Supp. Exs. (Lockett Dep. at 11; Paulk Dep. at 20).

[17]Plaintiffs submitted copies of 45 graduation programs to the district court. Almost all use the terms "invocation" and "benediction," and most list the student speaker as the class chaplain. See R2 (Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction, Exs. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 22, 25, 26, 27, 28, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 43 44, 45).

[18]The majority argues that the student speaker's speech is private, and thus cannot violate Lemon's second prong. I believe the opening and closing messages can be attributed to the State, but the disagreement is not

See Black Horse Pike, 84 F.3d at 1487; Harris, 41 F.3d at 458. The fact that prayers delivered as a result of the policy occur at a stage of the graduation ceremony carrying the strongest imprint of the state further exacerbates this impermissible effect.

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dispositive here. The Fifth Circuit addressed this point cogently in Santa Fe, holding that, "The mere fact that prayers are student-led or student-initiated, or both, does not automatically ensure that the prayers do not transgress Lemon's second prong.... [Wlhen the school 'permits' sectarian and proselytizing prayers ... such 'permission' undoubtedly conveys a message not only that the government endorses religion, but that it endorses a particular form of religion." 168 F.3d at 817-18. In a different context the Seventh Circuit has also held that private speech can violate Lemon's primary effects prong if private expression is associated with a government-controlled forum. See Freedom From Religion Found. v. City of Marshfield, -- F.3d --, No. 99-1639, (7th Cir. Feb. 4, 2000) (statue of Jesus on private land deemed part of surrounding public park for Establishment Clause purposes). The next section, focusing on the public forum doctrine, discusses this issue more thoroughly.

In support of its conclusion, the majority cites a number of Supreme Court cases for the proposition that "facially neutral programs [permitting] individuals to support religion through their own private choices" are constitutional. Those cases all involve the extension of a public benefit to families with children in private schools-- factual scenarios very different from Duval's graduation policy. Moreover, the programs at issue in those cases were constitutional because they did not influence families' choice to send their children to religious schools. See Agostini v. Felton, 521 U.S. 203,230-32,117 S. Ct. 1997, 2014 (1997); Witters v. Washington Dep't of Servs. for the Blind. 474 US. 481, 488, 106 S. Ct. 748, 752 (1986); Mueller v. Allen, 463 U.S. 388, 398-99, 103 S. Ct. 3062, 3068-69 (1983). This was because the programs distributed their benefits neutrally and comprehensively. A related point is that every family was able to make its own choice about its children's schooling under the government programs. Both of these attributes are missing in our case. The constraints of the Duval County policy influence the decisions about the graduation message, pushing students to opt for prayer. Furthermore, there is only one graduation ceremony. "Each student is not allowed to have the graduation she wants. Instead the decision is made by a majority of the senior class and imposed on a minority." Harris, 41 F.3d at 456.

C. The Public Forum Doctrine

Without deciding whether Duval County graduation ceremonies are public fora, the majority suggests that the public forum doctrine supports the constitutionality of the policy at issue in this case. I reject the analogy. According to the majority, the government does not control a private speaker's speech in a public forum, and private speech cannot convey a message of state endorsement. This may be an accurate statement of the law,[19] but it is of little use in this case, because Duval County's graduation ceremonies have none of the public forum's characteristics. In Lee v. Weisman, the Supreme Court noted that school authorities maintain close control over the program and speeches at

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[19]In fact five Justices have demonstrated an openness to the possibility that private speech in a public forum could violate the Establishment Clause. See Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 772, 115 S. Ct. 2440, 2451 (1995) (O'Connor, Souter, & Breyer, JJ., concurring in result); id. at 807, 115 S Ct. at 2469. (Stevens, J., dissenting); id. at 817-18, 115 S. Ct. at 2474-75 (Ginsburg, J., dissenting). Only a plurality of the Court in an opinion written by Justice Scalia, took the opposite view. See id. at 770, 115 S. Ct. at 2450. Even the Scalia plurality acknowledged that the government could unconstitutionally manipulate an ostensibly public forum to favor religious speech. See id. at 766, 115 S. Ct. at 2449.

The Seventh Circuit reached this same conclusion, determining that a majority of justices had rejected a "per se" approach to Establishment Clause claims involving private speech in a public forum. See Freedom From Religion Found. The Seventh Circuit went on to hold that a city's sale of land with a religious statue violated the Establishment Clause even under the Scalia plurality's approach because it in effect granted preferential access to a public forum-the park surrounding the statue. See id. at *8.

graduation ceremonies.[20] 505 U.S. 577, 597, 112 S.Ct. 2649, 2660 (1992). This assumption is understandable, because graduation ceremonies have never been considered public fora. See ACLU of N.J. v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471, 1478 (3d Cir. 1996); Jones v. Clear Creek Indep. Sch. Dist., 930 F.2d 416, 418 (5th Cir. 1991), vacated on other grounds, 505 U.S. 1215, 112 S. Ct. 3020 (1992); Doe v. Madison Sch. Dist. No. 321, 147 F.3d 832, 838 (9th Cir. 1998), vacated as moot, 177 F.3d 789 (9th Cir. 1999) (en banc).

Public fora are places permitting broad access for the expression of diverse views. See Cornelius v. NAACP Legal Defense & Educ. Fund. Inc., 473 U.S. 788, 8023, 105 S. Ct. 3439, 3449 (1985);Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45, 103 S. Ct. 948, 954-55 (1983). See, e.g., Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 757-58, 115 S. Ct. 2440, 2444 (1995). The "marketplace of ideas"' governs in public fora, which serve an important role both in facilitating the exchange of viewpoints and in providing a safe venue for new and marginalized ideas.

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[20]In Duval County for example, school officials often review the valedictorian's speech, and they plan or approve the entire graduation program. See R 1st Supp. Exs. (Reynolds Dep. at 21; Epting Dep. at 26-27; Lockett Dep. at 11) (review of valedictory speeches); id. (Epting Dep. at 28-29; Reynolds Dep. at 39; Stone Dep. at 9-10). The graduation policy allows these practices to continue.

Duval County certainly did not create a public forum by allowing a single student to deliver an uncensored opening or closing message. An essential characteristic of public fora is that they permit extensive public participation, or at least general access to the relevant class of potential speakers. See Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 118 S. Ct. 1633, 1641-43 (1998); Cornnelius, 473 U.S. at 802-04, 105 S. Ct. at 3449-50; Perry Educ. Ass'n., 460 U.S. at 47, 103 S. Ct. at 956; Greer v. Spock, 424 U.S. 828, 838 n. 10, 96 S.Ct. 1211, 1217 n. 10 (1976). The majority cites a number of cases permitting religious groups to use school facilities or funds, or public parks, but their holdings depended on the fact that use of the fora by a "broad spectrum" of groups eliminated any potential message of endorsement or preference for religion.[21] See Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 839-42, 115 S.Ct. 2510, 2521-23 (1995); Capitol Square, 515 U.S. at 762-63, 115 S. Ct. at 2447; Board of Educ. of the Westside Community Sch. v. Mergens, 496 U.S. 226, 252, 110 S. Ct. 2356, 2373 (1990) (O'Connor, J., plurality opinion); Widmar v. Vincent, 454 U.S. 263, 274, 102 S. Ct. 269, 277 (1981).

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[21]Furthermore, none involved speech at a government-sponsored and controlled event. The possibility that someone will conclude that the state is endorsing the content of a speech is much lower when the government allows an organization to use a classroom after school hours than when the government organizes a presentation and invites an audience. Certainly students could organize a private prayer meeting on school grounds before the official graduation ceremony, but that is not the issue here.

Duval County, however, has implemented no "open microphone" policy at its graduation ceremonies. The graduation policy permits only one speaker at the opening and closing, so there can be no diversity of views communicated in the messages. Selecting speakers through a majority vote also runs counter to the notion of "general access" necessary for a public forum and limits the possibility that the resulting speech will offer a fresh perspective to the audience. When the student speaker delivers the opening or closing message at a Duval County graduation, she is largely preaching to the converted.[22]

D. Appellants' As-Applied Claims

During the hearing for a preliminary injunction, the district court raised the possibility of advancing the trial on the merits pursuant to Federal Rule of Civil Procedure 65(a)(2).[23] In an order dated the same day, the court did so,

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[22]It is true that in a public forum with open access and diverse expression, it would be difficult for the government to manipulate speech and there is little danger that an audience will believe the speech carries the government's imprimatur. This insight from public forum law, however, suggests a corollary that highlights the graduation policy's problems: at a non-public forum that is highly regulated by the government, there is both an elevated danger of government control over speech and a significant risk that the audience will associate the speech with the government.

[23]Federal Rule of Civil Procedure 65(a)(2) provides:

> (2) *Consolidation of Hearing With Trial on Merits.* Before or after the commencement of the hearing of an application for a preliminary injunction, the court may

consolidating the trial on the merits with the preliminary injunction hearing and entering final judgment for the Duval County School Board. The majority claims Appellants waived their as-applied claims by consenting to the consolidation. This interpretation of Rule 65(a)(2), however, is without support in the case law or the record from the district court.

If a party consents to a Rule 65(a)(2) consolidation, it cannot later complain about the consequences-the limited time to prepare and the curtailed opportunity for discovery. See Fenstennacher v. Philadelphia Nat'l Bank, 493 F.2d 333, 337 (3d Cir. 1974). But the majority cites no case for the proposition that advancing the trial on the merits eliminates claims that would have benefitted from thorough discovery. Instead, a court enters final judgment on all claims after a Rule 65(a)(2) consolidation based on whatever limited evidence is before it at that time.

Nothing in the district court order advancing the trial on the merits or in transcript of the preliminary injunction hearing suggests that the judge or the parties intended

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> order the trial of the action on the merits to be advanced and consolidated with the hearing of the application [for a preliminary injunction]. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a)(2) shall be so construed and applied as to save to the parties any right they may have to trial by jury.

otherwise. No one disputes that in their complaint the Appellants pleaded facts pertaining to graduation ceremonies between 1993 and 1997 and included an as-applied claim.[24] Immediately after broaching the possibility of a Rule 65(a)(2) consolidation at the preliminary injunction hearing, the district judge acknowledged that Appellants had a claim for damages.[25] At no time during the hearing did the judge suggest he was dismissing the as-applied claims as waived.

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[24]See RI, Tab I (Verified Complaint ¶¶ 24, 30, & at p.14) (making factual allegations about graduation ceremonies between 1993 and 1997, raising an as-applied Establishment Clause claim, and praying for damages on behalf of students
who graduated after 1993).

[25]The dialogue went as follows:

> THE COURT: All right. The next question is why shouldn't I, under Rule 65(a)(2) of the Federal Rules of Civil Procedure, order that the consideration of this case on its merits be advanced to this stage procedurally and decide the case and send it on to the Court of Appeals?
>
> MR. SHEPPARD: I think the Court certainly has that discretion. I think that it may be-well, I've said what I said.
>
> THE COURT: Well, you have a damage claim. I understand that.
>
> MR. SHEPPARD: Yes, sir. We would want to take some discovery with regard to that, would be my view.

See R1, Tab 30, at 29 (Transcript of Hearing on Plaintiffs' Motion for Preliminary Injunction).

In its order advancing the trial on the merits, the district court directed the Clerk to enter final judgment for the Defendants without distinguishing between the facial and as-applied claims.[26] The order made scant reference to the facts of the case, and the assertion in the order that Appellants' counsel "stipulated that the operative facts remain[ed] unchanged"[27] since 1994 is unsupported by the record. In fact, during the preliminary injunction hearing the Appellants' counsel made substantial reference to the evidentiary exhibits already filed with the court and expressed the need for further discovery.[28] The order focused on whether the law had changed since 1994, when the same district judge upheld the constitutionality of the graduation policy in an earlier lawsuit, see Adler v. Duval County Sch. Bd., 851 F. Supp. 446 (M.D. Fla. 1994), and the court concluded that it had not. Given its interpretation of Establishment Clause and Free Speech jurisprudence, the details of the graduation ceremonies in Duval County seemed unimportant.

Appellants did not waive their as-applied challenge to the graduation policy; the district court entered judgment

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[26]R1, Tab 27 at 3-4.

[27]Id. at 2.

[28]See R1, Tab 30, at 14-16, 29 (Transcript of Hearing on Plaintiffs' Motion for Preliminary Injunction).

for the Appellees on that claim. This may or may not have been the correct disposition, because the district court did not have a thorough record of the policy's application.

There is a difference between having a thin record, however, and having no evidence at all. Appellants filed dozens of graduation programs from the years 1994-1998 and the affidavit of Karen Adler in support of their motion for a preliminary injunction in this case,[29] and the district court also took judicial notice of the record from the earlier case concerning the Duval County policy.[30] The record includes the transcript of sectarian prayers delivered at graduation ceremonies as well as official programs that contained printed prayers, referred to the "student message" as an "invocation," and indicated that ministers have continued to deliver prayers at some Duval County graduations long after Lee.[31] In fact, Appellants maintain that although they would welcome the opportunity for

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[29]See R2 (Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction, with 58 exhibits); R1, Tab 12 (Adler Aff.).

[30]R1, Tab 26 (Order on Various Motions).

[31]See R2 (Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction, Exs. 4, 5, & 13 (religious expression printed in official program); 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 22, 25, 26, 27, 28, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 43, 44, 45 (reference-to "invocation," "benediction," or "chaplain" in the program); 30 (minister delivered prayer).

more discovery, the record supports a reversal in their favor on all claims.

The procedural posture of this case is awkward at best. It is understandable that both the district court and this court would want to focus, without complications, on the important question of the graduation policy's facial constitutionality. It is not right, however, for the as-applied claim of Duval County students to disappear without a trace.

Conclusion

Duval County has not adopted a blanket approach of neutrality toward religion or eliminated school sponsorship and control over graduation ceremonies. Rather, the policy at issue in this case evinces a desire to maintain the graduation ceremony's traditional invocation and benediction in the wake of Lee. The policy does not explicitly mention religion and does not require any speech at all, but its terms nonetheless promote religious expression. To be more specific, the policy encourages the delivery of a prayer during a stage of the graduation ceremony when the content seems most "official" and when officials' control over audience participation is at its highest. This violates the Constitution. The Establishment Clause bars the government from encouraging religious expression, either overtly or subtly, and from conveying a message,

intentional or not, of endorsement for religious speech.[32] Moreover, the policy utilizes the vote to further its purpose, and in so doing corrupts the most cherished of democracy's tools. For the government cannot delegate the authority to do what it could not do itself, and constitutional rights are not subject to the whims of an electoral majority. For the foregoing reasons, I dissent from the majority's opinion.

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[32]Nothing in this dissent suggests that all religious expression at a public high school graduation would run afoul of the Establishment Clause. Graduation ceremonies are state-sponsored events controlled by school officials, however, and to disconnect (rather than just distance) themselves from any religious views expressed by speakers, school officials must be able to articulate a neutral criterion for selecting speakers unrelated to the potentially religious content of their speech. This would ensure both that school officials do not use their influence over the graduation program to promote religious beliefs and that the audience does not view religious views expressed by speakers as state sanctioned. Thus, the valedictorian could thank God or share the role faith played in her life. Furthermore, religious expression that is not part of the graduation program raises no Establishment Clause concerns. Audience members could pray quietly in their seats, and students could organize a prayer service immediately before or after the graduation ceremony.